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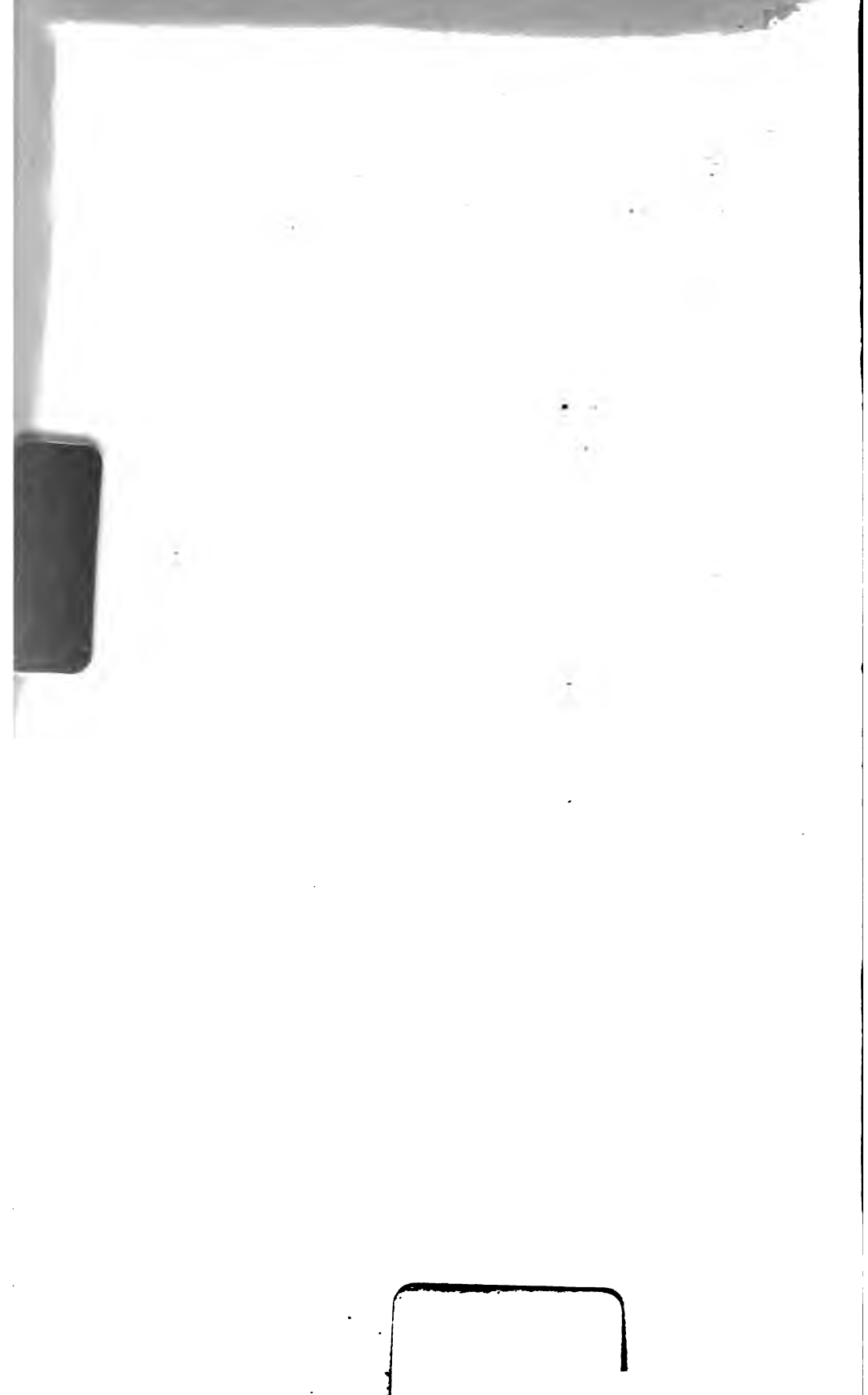
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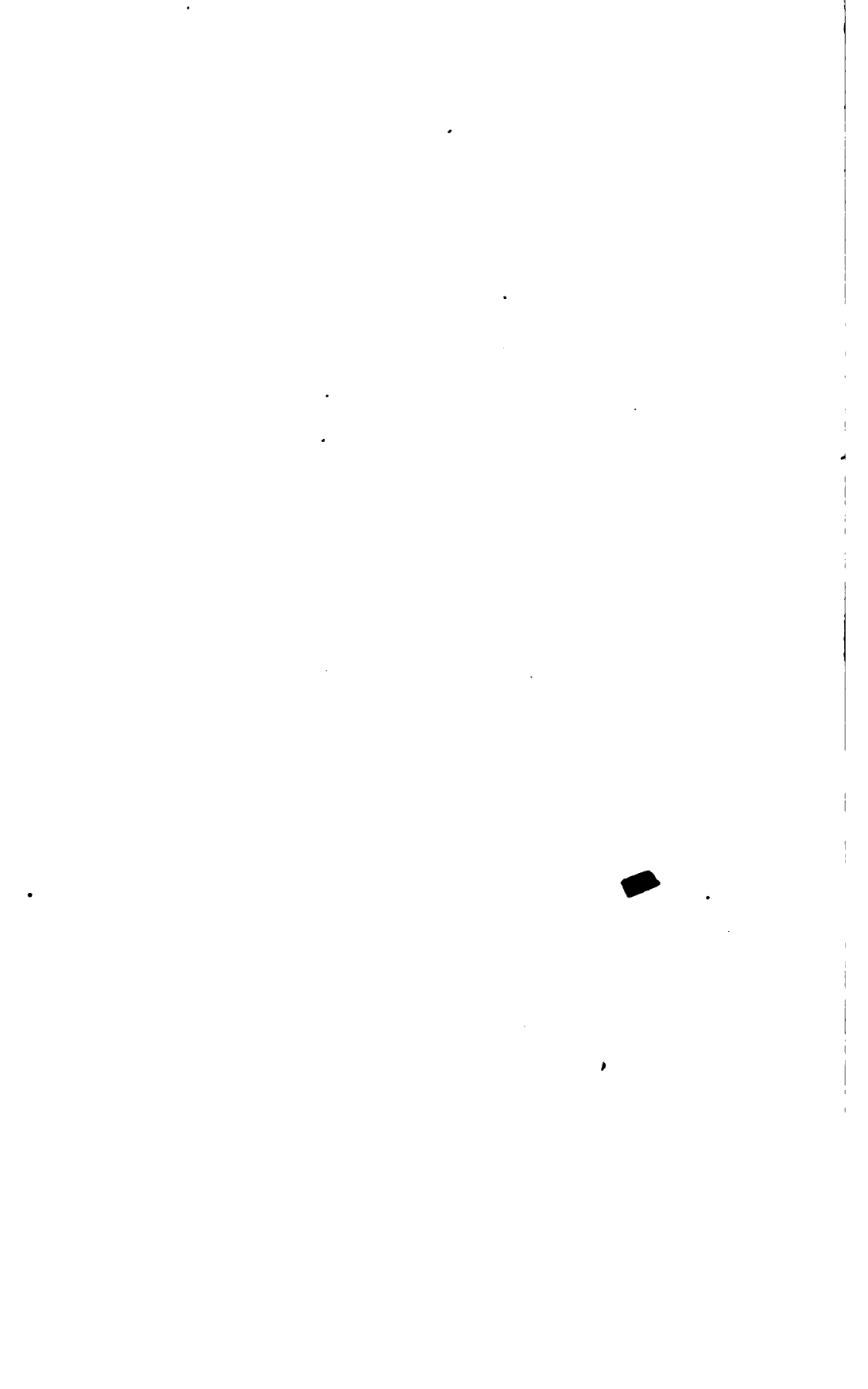
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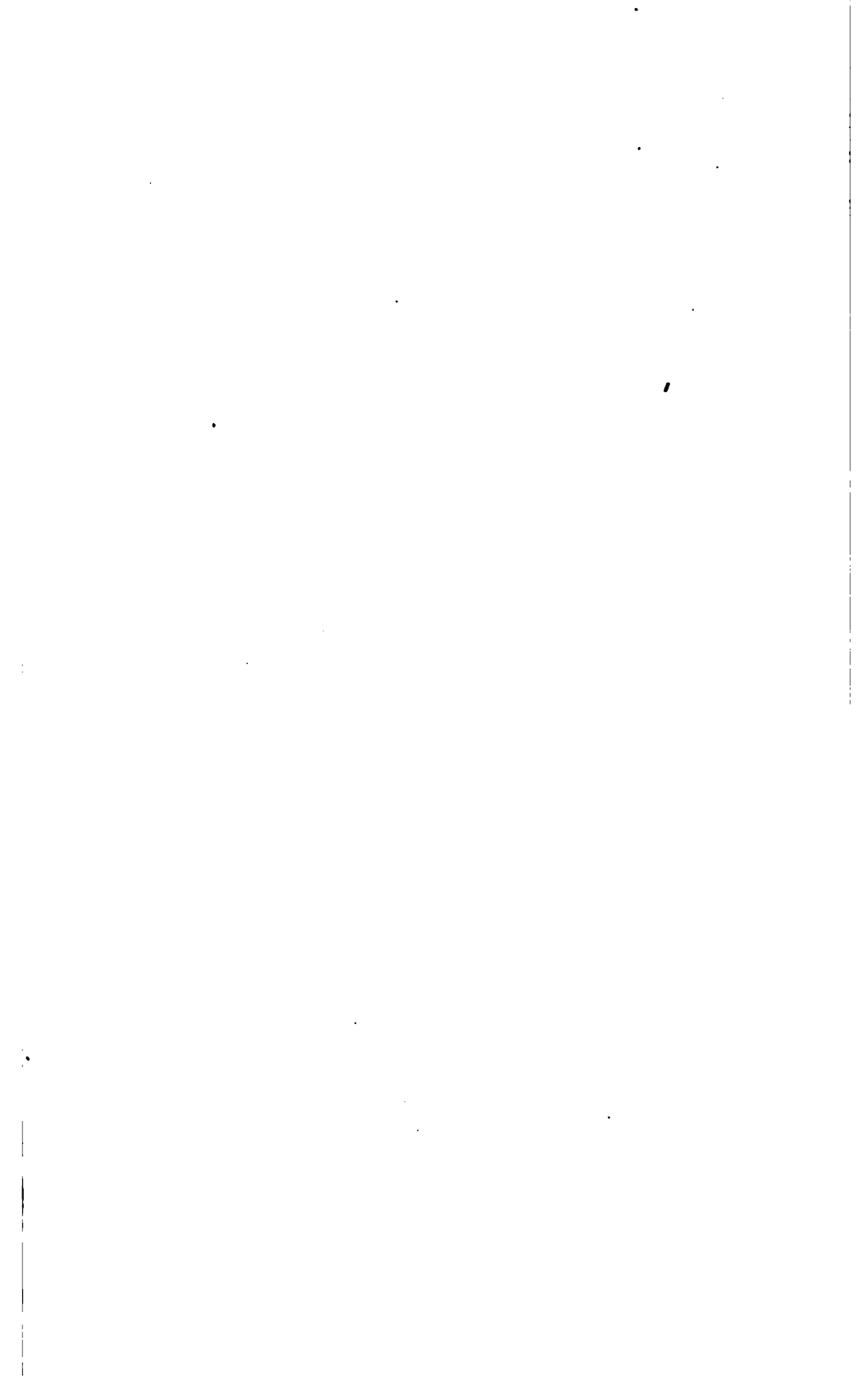
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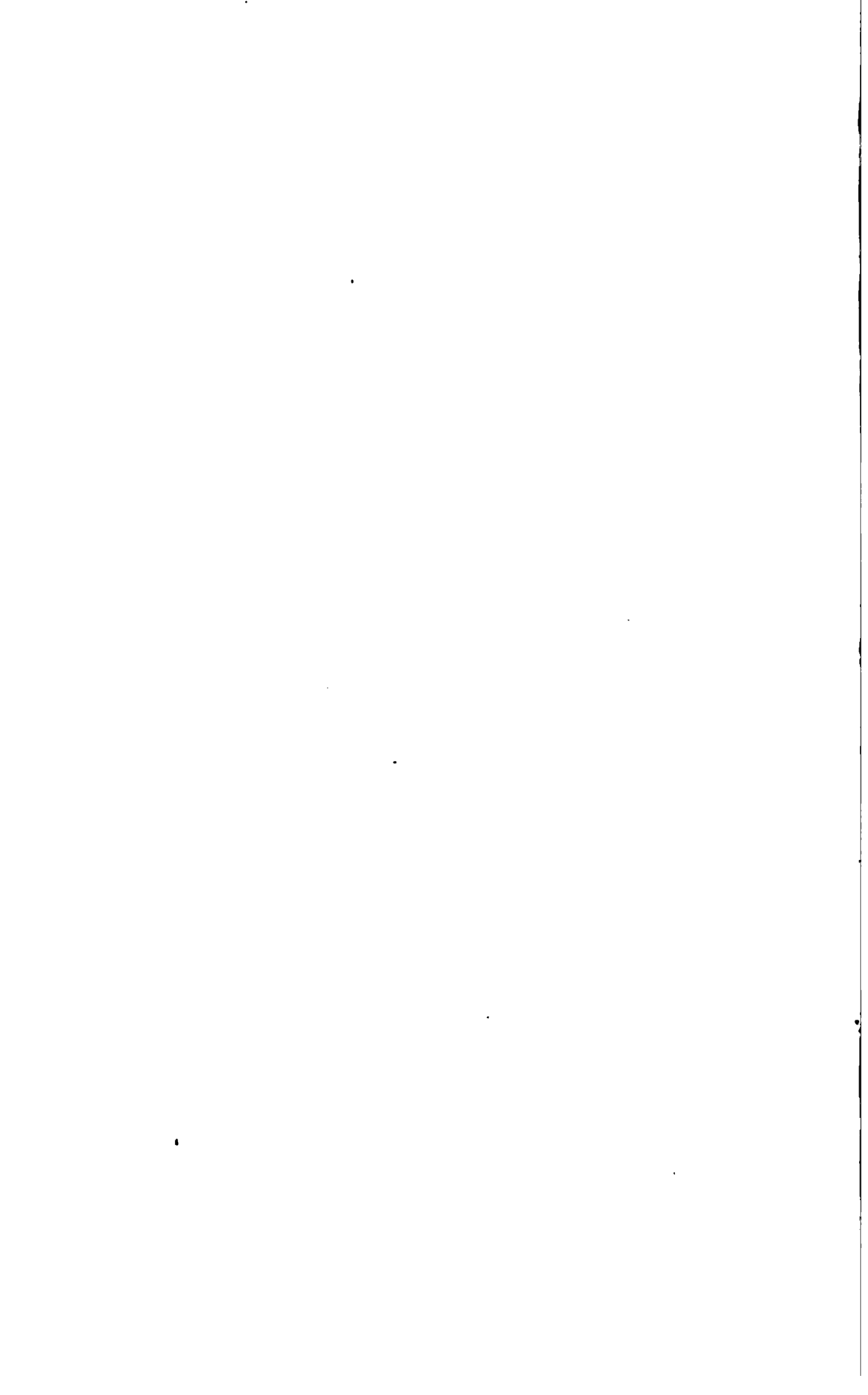


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REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, S. MACNAGHTEN, AND A. GORDON, Esqs.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

DYSON *v.* HORNBY.

DYSON *v.* BOURNE.

ERLE *v.* DYSON.

ERLE *v.* BOURNE.

HORNBY *v.* MATHISON.

COOK *v.* STURGIS.

1854. November 17. 1855. May 8. Before the LORDS JUSTICES.

Held, by L. J. TURNER, *dubitante* L. J. KNIGHT BRUCE, that, although the property to which a debtor was equitably entitled at the time of his taking the benefit of the Act for the Relief of Insolvent Debtors may far exceed the amount of the debts payable under the insolvency, neither he nor a purchaser from him can intercept the title of the assignee under the insolvency to recover the surplus without showing that the property will be in danger if the assignee be permitted to receive it, or that there is some impediment to an application to the Insolvent Court to remove the assignee, if such is the case.¹

It not appearing clear to L. J. KNIGHT BRUCE, in the case before the Court, that there was a net surplus, *held*, by both their Lordships, reversing a decision of a Vice-Chancellor, that no interference with the title of the assignee ought to have taken place.

¹ "The rules with regard to bankrupts applied, by analogy, to persons who had taken the benefit of the Insolvent Debtors' Acts, who were equally con-

THIS was an appeal from an order in the above causes, dated the 24th of April, 1854, and made by the Vice-Chancellor STUART upon a petition in all the causes, and upon the hearing of a claim in the cause of *Cook v. Sturgis*, which was filed under the following circumstances:—

George William Dyson, the plaintiff in the suit of *Dyson v. * 2 Hornby*, was entitled to some considerable funds * standing in trust in the suit of *Dyson v. Hornby*. He took the benefit of the Insolvent Debtors Act, and James Markwell was appointed to be the assignee under his insolvency. Afterwards, by an indenture, dated the 8th of July, 1850, made between the insolvent of the first part, Robert Cook of the second part, and a trustee for Robert Cook of the third part, in consideration of the purchase-money therein mentioned to him, paid by Cook, the insolvent conveyed and assigned unto Cook, his heirs, executors, and administrators, the real estates therein particularly mentioned, and all other the real estate, copyhold and freehold, late of, or belonging to, a certain testator named John Edwards, subject to the debts and charges upon the same therein mentioned; and, likewise, the life-interest of the insolvent of and in the share therein mentioned of the residuary personal estate of his late father Thomas Edwards Dyson, deceased, and all and every other the estate and interest of him the insolvent, and to which he was then, or might thereafter in any manner howsoever become, entitled under the said will of his late father, to hold the same for Cook, his heirs, executors, administrators, and assigns, for his and their own absolute use and benefit, subject, nevertheless, to the payment of the sum therein mentioned, being the amount of debts, or thereabouts, contained in the schedule filed by the insolvent under the insolvency.

The interests, so conveyed and assigned by the insolvent to Cook by the above deed, comprised all the insolvent's right and interest (subject to the payment of his debts under the insolvency) of and in the funds in Court in *Dyson v. Hornby*.

On the 17th February, 1852, James Markwell, the then * 3 sole assignee under the insolvency, presented a * petition

sidered as being divested of all right to maintain a suit in respect of any surplus to which they might eventually be entitled; but these provisions are no longer in force; and all persons, whether traders or non-traders, are now subject to the bankrupt laws." 1 Dan. Ch. Pr. (4th Am. ed.) 61, and cases in notes to these points; *Cook v. Sturgis*, 3 De G. & J. 506.

in *Dyson v. Hornby*, stating Cook's purchase deed, above mentioned; and that Cook had become entitled to certain of the debts or charges claimed against the estate of the insolvent; that, subject to the payment of certain debts of the insolvent, mentioned in the purchase deed, and to certain judgments, and also to the other debts mentioned in the insolvent's schedule, Cook was then entitled to the estate and effects of the insolvent, or the proceeds thereof, under and by virtue of the purchase deed; and further stating, that it had been arranged and agreed upon between the petitioner as such surviving assignee of the insolvent, and the said Robert Cook as the purchaser of the surplus estate of the said insolvent, after payment of his debts as aforesaid, subject to the approbation of the Court, that after payment of the above-mentioned debts and the judgment creditors of the insolvent, and the several amounts of costs mentioned in the petition, 5000*l.* should be paid out of the fund in Court to the provisional assignee of the Insolvent Court, in order to make up, together with the amount then remaining in the name of the said provisional assignee, sufficient to pay all the other unsatisfied debts of the insolvent mentioned in his said schedule, and also the costs and expenses of the assignees of the insolvent, and that the balance which might remain of the funds in Court should be transferred to Cook, and praying that this arrangement might be carried into effect.

By an order dated the 30th of March, 1852, made on the above petition by the late Vice-Chancellor PARKER, it was directed that the sum of 21,889*l.* 5*s.* 6*d.* bank 3*l.* per cent annuities, standing in the name of the accountant-general in trust in the cause of *Dyson v. Hornby*, should be sold; and that out of the moneys to arise by the said sale, the several principal sums, and interest therein mentioned, should be paid to the several * parties * 4 therein mentioned; and satisfaction was thereby also ordered to be entered up by the several parties therein mentioned, upon the judgments therein mentioned, and the costs of all parties of the said suits, and the costs of Markwell and of Cook of the application, and otherwise as therein mentioned, were thereby directed to be taxed and paid. And it was ordered that the ultimate residue of the moneys to arise by the said sale should be paid to the petitioner James Markwell, as assignee of the insolvent.

James Markwell was afterwards removed from being assignee, and Samuel Sturgis was appointed in his place; and by an order

dated the 11th of December, 1852, the money by the last-mentioned order directed to be paid to James Markwell was ordered to be paid to Samuel Sturgis.

The bank annuities by the order directed to be sold as aforesaid had been sold out, and the moneys arising therefrom paid into the bank to the credit of the other causes pursuant to the order.

Cook then instituted the last of the above-mentioned suits against the provisional assignee under the insolvency, and, by his claim, stated that all the several sums of money by the last-mentioned order directed to be paid had been paid and satisfied, and that, after payment out of the remainder of such money of the costs, and costs, charges, and expenses by the order directed to be taxed and paid (but which had not yet been taxed), there would remain an ultimate residue of 9368*l.* 7*s.* 8*d.* to the credit of *Dyson v. Hornby* and others of the above-named causes, and which, according to the terms of the last-mentioned order, would become payable to the defendant Samuel Sturgis, as the assignee of the

* 5 estate * and effects of the insolvent. The claim further stated that there were no debts of the insolvent payable under his insolvency other than such of the scheduled debts as remained unsatisfied, and that after all payments there would remain a surplus of 6888*l.* 7*s.* 8*d.*, which Cook, at the very least, was then indisputably entitled to have and receive, under his conveyance and assignment, and in respect of debts under the insolvency, to which he was entitled by assignment. Cook further stated by his claim that Sturgis threatened and intended to apply for and receive under the said order the whole of the fund in Court, constituting the residue, although he had no occasion or purpose whatever to receive or take for the purposes of the insolvency any more than 2500*l.* at the utmost; and that he had no occasion or purpose whatsoever to have or take the net balance or sum of 6888*l.* 7*s.* 8*d.*, to which Cook claimed to be entitled as aforesaid, or any part thereof, and that such last-mentioned sum ought accordingly, as the plaintiff Cook was advised, to be ordered to be paid to him. The plaintiff Cook therefore claimed to be entitled to, and to be declared entitled to have and receive, the sum of 6888*l.* 7*s.* 8*d.*, part of the sum of 12,368*l.* 7*s.* 8*d.* standing to the credit of the other causes.

The claim came on to be heard, together with a petition presented by Cook in the other causes; and the Vice-Chancellor made an order, directing that the sum of 2500*l.* cash, part of the

sum of 9825*l.* 15*s.* 2*d.* cash, standing to the credit of the causes, should be paid to the defendant Samuel Sturgis as the assignee of the estate and effects of George William Dyson; and that the sum of 7325*l.* 15*s.* 2*d.*, which would be the residue of the aforesaid sum of 9825*l.* 15*s.* 2*d.*, after the thereinbefore directed payment thereout should have been made, * should not be paid * 6 out without notice to Robert Cook and Samuel Sturgis.

Against this order Mr. Sturgis appealed.

Mr. Bacon and *Mr. Osborne*, in support of the appeal. — They contended that this Court was not the proper tribunal for deciding the question as to the application of the surplus, and that the Court for the Relief of Insolvent Debtors ought to be applied to.

They referred to Statute 1 & 2 Vict. c. 110, § 92.

The Lord Justice TURNER referred to *Rochfort v. Battersby* (a) and *Kaye v. Fosbrooke*. (b)

Mr. Malins and *Mr. Rogers*, for Mr. Cook, referred to *Tucker v. Hernaman*. (c)

Judgment reserved.

1855. May 8.

The Lord Justice TURNER, after stating the facts of the case, said: Several affidavits have been filed and were read before us, with reference to the amount of the debts payable under the insolvency, but in the view which I take of this case it is not necessary for me to enter into those affidavits. I assume, for the purposes of this appeal (as no doubt is the case), that the fund in this Court is more than sufficient for the payment of the debts under the insolvency. The question upon this appeal, as I view it, is whether it is competent to an insolvent debtor, or * any per- * 7 son claiming under him, by proceedings in this Court, to intercept the title of the assignee under the insolvency to receive the property of the insolvent in a case in which it is not proved or even alleged that the property will be in danger if the assignee be

(a) 2 H. L. Cas. 388. (b) 8 Sim. 28. (c) 4 De G., M. & G. 395.

permitted to receive it, or that there is any impediment to an application to the Insolvent Court to remove the assignee, if any such case exists.

And I am of opinion that neither the insolvent nor any person claiming under him has, under such circumstances, any right so to intercept the title of the assignee. The legislature has created the Insolvent Debtors' Court for the purpose of administering the estate of insolvents; has provided for the vesting of their estates in their assignees; for the payment of their debts, and for the revesting in them, or those claiming under them, of the surplus, if any, of their property through the medium of that Court; and I scarcely know any thing which, in my judgment, would be more mischievous than for this Court to interfere with the jurisdiction thus created by the legislature. If this Court were to interfere as to the surplus it could hardly stop short of ascertaining whether there was a surplus or not, and then there would follow an examination of all the property of the insolvent and an inquiry as to each of his debts, without the powers which the legislature has given to the Insolvent Court, for the purposes of such examination and inquiry.

This Court has no original jurisdiction over the estates of insolvents, and none of the Insolvent Acts can, as it appears to me, be construed to give it any such jurisdiction. The assignees, indeed, may be said to be in a sense trustees, but they are trustees to deal with and distribute the property according to the orders of * 8 the Insolvent * Court, and not according to the orders of this Court in the exercise of its general jurisdiction over trusts.

It is unnecessary, however, further to pursue the subject, for the point seems to me to be governed by decision. The case of *Rochfort v. Battersby*, (a) in the House of Lords, to which I referred in the course of the argument, seems to me to be decisive upon it.

I am of opinion, therefore, that this petition and claim ought to be dismissed, and I think they should be dismissed with costs, including the costs of the appeal.

THE LORD JUSTICE KNIGHT BRUCE.—I have had more doubt than has been felt by my learned brother as to the proper mode of

(a) 2 H. L. Cas. 388.

disposing of this case, which circumstance, combined with the nature (I had almost said the harmless nature) of the order under appeal and a hope on my part of an arrangement being effected between the contending parties, has caused our judgment to be so long deferred; a delay attributable to myself alone.

The order is probably informal, which, however, is a matter of little or no importance. But I have failed in my endeavours to make myself think it maintainable substantially. Perhaps if a perfectly clear title had appeared to me to be shown in Mr. Cook, and the utmost possible amount of every possible claim on the fund in question had been made manifest, and could be provided for here so as to leave plainly a net surplus belonging to Mr. Cook, I might have thought it right to accede in part at least, if not wholly, to what he has asked. But the case does not seem to me in that condition. He has not, I * think, shown sufficient * 9 ground for interfering with the order made by the Vice-Chancellor PARKER, or with the jurisdiction of the Insolvent Court, which can, and no doubt will, do effectual justice in the matter.

I fear, therefore, that the appeal must succeed, and his claim and petition be dismissed, but without prejudice to any proceedings or question in the Insolvent Court.

HUTTON v. ROSSITER.

1854. December 1. 1855. April 23. Before the LORDS JUSTICES.

A testator directed that certain legacies should remain at interest in his business. His executor, who was his brother and partner, credited in his books the legatees, who were the executor's sons and had access to his books, with the amounts of the legacies, and with interest upon them, but in a deed between the parties the accounts were recited to be unsettled. He returned to the stamp office the estimated value of the testator's estate, at an amount more than sufficient for payment of the legacies, and paid duty upon them and upon a residue beyond. *Held*, that, in the circumstances of the case, those acts did not amount to a conclusive admission of assets.¹

One of the legatees had on his marriage assigned a part of his legacy to the trustees of his settlement, covenanting to pay the amount by instalments. It appeared, on the evidence, that the marriage was contracted and the

¹ See *Cadbury v. Smith*, L. R. 9 Eq. 37.

settlement made on the faith of representations by the executor that the legacy was substantial and safe and would be paid, though at a future time. *Held*, that the estate of the executor thereby became indebted for the whole amount.¹

THIS was an appeal from the decision of Vice-Chancellor STUART, confirming the certificate of the chief clerk, whereby William Macintosh Hutton, the testator in the cause, was found to be indebted to the respondents (his two sons) in respect of an admission on his part of assets come to his hands as executor of a former testator named Robert Hutton.

The two testators were brothers and partners in business, until the death of Robert Hutton, which took place on the 1st of April, 1849. Robert Hutton by his will, gave a legacy of 5000*l.* to

* 10 each of the respondents, * James Frederick Hutton, and

Thomas Calvert Hutton (sons of William Macintosh Hutton), but directed that these legacies should remain at interest in the business, and should not be called in by the legatees except by certain instalments payable after six months' notice, and he appointed William Macintosh Hutton, Robert Rossiter Hutton, and the respondents his executors. The will was proved by all of them, except the respondent Thomas Calvert Hutton, who was still an infant. Soon after Robert Hutton's death William Macintosh Hutton, who continued to carry on the business, gave credit to his brother's estate in the books of the firm for a balance of 64,000*l.* Accounts were also opened in the same books with each of the respondents, to whom William Macintosh Hutton gave credit in those accounts for the amount of the principal of their legacies, and also for interest upon them. The respondents had been, in the lifetime of the testator (their uncle), and continued

¹ See 3 Lead. Cas. in Eq. (3d Am. ed.) 370, in notes to *Row v. Dawson and Ryall v. Bowles*; 2 Smith Lead. Cas. (5th Am. ed.) 642 *et seq.*; *Ainsley v. Medlycott*, 9 Ves. (Sumner's ed.) 24, Mr. Hovenden's note (3); 1 Story Eq. Jur. § 190 *b. et seq.*; *Kerr Inj.* 34, 35; *Jennings v. Broughton*, 5 De G., M. & G. 126 and notes; *Loddell v. Baker*, 3 Met. 469; *Audenried v. Betteley*, 5 Allen, 384; *Plumer v. Lord*, 9 Allen, 455; *Osgood v. Nichols*, 5 Gray, 420; *Langdon v. Doud*, 10 Allen, 437; *Andrews v. Lyons*, 11 Allen, 349; *Turner v. Coffin*, 12 Allen, 401; *Fall River National Bank v. Buffinton*, 97 Mass. 498; *Hawes v. Marchant*, 1 Curtis, 136; *Vibbard v. Roderick*, 51 Barb. 616; *Brookman v. Metcalf*, 4 Rob. (N. Y.) 568; *Vanderpool v. Brake*, 28 Ind. 130; *Ridgway v. Morrison*, 28 Ind. 401; *Chouteau v. Goddin*, 39 Missou. 229; *Davidson v. Young*, 38 Ill. 139.

to be, employed as clerks in the business, and were aware of the entries made, and the accounts opened in the books. A deed was, however, executed in 1851, by the parties, containing a recital that the accounts had not been settled.

In August, 1851, William Macintosh Hutton, as executor of Robert Hutton's will, passed his residuary account, in which he stated the estimated value of the share of the book debts belonging to the testator Robert Hutton as 43,516*l*. He also paid legacy duty on all the legacies bequeathed by his brother's will, amounting to about 37,000*l*., and on a residue beyond that amount.

In January, 1852, he died, having made his will, and, the present suit having been instituted to administer his estate, and the usual accounts having been directed, the * respondents * 11 claimed to rank as creditors on his estate for the amount of the legacies of 5000*l*. each.

The chief clerk allowed the claims, and the Vice-Chancellor confirmed the allowance.

Mr. Bacon and *Mr. Selwyn*, for the plaintiff (who was a creditor of the executor), in support of the appeal, referred to *Postlethwaite v. Mounsey*, (a) *Barnard v. Pomfret*, (b) *Clark v. Bates*. (c)

Mr. Malins, *Mr. Piggott*, and *Mr. A. J. Lewis*, for the respondents, referred to *Lazonby v. Rawson*, (d) *Whittle v. Henning*, (e) *Hart v. Mimors*, (g) *Gregory v. Harman*. (h)

Mr. Baggallay, for the executor of William Macintosh Hutton.

Mr. Bacon, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I think that the creditors are entitled to have the order varied. Whether this will ultimately be beneficial to them may be a question. I consider it a just inference from the materials before us that William Macintosh Hutton never intended to admit assets of the testator Robert Hutton. I also think it a just conclusion that the conduct of William Macin-

(a) 6 Hare, 33, note.

(b) 3 Myl. & Cr. 63.

(c) 2 De G. & Sm. 203.

(d) 2 Sm. & Gif. 267.

(e) 2 Beav. 396.

(g) 1 Cr. & Mee. 700.

(h) 1 M. & P. 209.

tosh Hutton with respect to the assets did not at any time deceive or mislead either of his sons, the present claimants in the *12 matter. There *is, in my opinion, no reason for believing that either of the sons regulated his conduct upon the notion of any admission of assets on the part of their father. As there was, in my judgment, an absence of intention to admit assets on the part of William Macintosh Hutton, and as the decision pronounced in this matter proceeds entirely or mainly, as I understand, on the supposed admission of assets, I think the appellants entitled, as I have said, to have the order varied.

It seems to me, from the materials before the Court, highly probable that the intention of William Macintosh Hutton in making the entries relied upon, or allowing them to be made in the books, as he did, was honestly and fairly to become master of the whole of his brother's estate engaged in the partnership for his own benefit, on the terms of charging himself with the legacies. At least, no more favourable view for the legatees can be taken, though whether so favourable a view can be taken may be doubtful. But supposing that it can, such an intention could not be effectual, for the surviving partner was an acting executor, and some of the legatees were infants, who could not accept the personal liability of the executor in lieu of their specific right to resort to the assets, and their title to have the estate of the testator applied in a due course of administration. If, therefore, the intention of the executor was such as I have supposed, the intention could not be effectual; and it is, in my opinion, impossible, as the matter now stands, to hold that William Macintosh Hutton's estate is bound by such an intention.

The question is not before us whether or to what extent as executor he ought to be bound in respect of a valuation made by himself of his testator's assets, nor whether he is liable to be *13 charged for any wilful default. *The question is merely as to an admission of assets arising in a suit for the administration of the executor's estate, a proceeding in which, as matters stand, his brother's estate cannot be administered, and the accounts concerning that estate are not capable of being dealt with.

It appears to me (entertaining as I do considerable doubt whether the appellants will in the result gain by their present success, if success it is), that the two debts in question, which now stand allowed, should be converted into claims, that such

dividends as would be made on them if debts, and as are reserved in cases of claims, should be reserved, and that all parties should be at liberty to take such proceedings as they may be advised with respect to the administration of the estate of Robert Hutton and the acts of William Macintosh Hutton as executor.

THE LORD JUSTICE TURNER. — Three points have been insisted upon in favour of charging the estate of William Macintosh Hutton with the full amount of these legacies as upon an admission of assets: first, that William Macintosh Hutton credited the testator's estate in the account between the partnership and the executors of his brother with more than sufficient to answer the legacies, and that he opened an account with each of the legatees, in which they were credited with the amount of their legacies; secondly, that some years after his testator's death, William Macintosh Hutton passed his residuary account at the stamp office, and in that account took credit for the legacies, and paid duty on them to their full amount; and, thirdly, that payments were made to the legatees upon that footing for interest upon the legacies.

* With respect of the credit of 64,000*l.* in the accounts, * 14 it appears on the balance sheet that, in 1848, immediately before the testator's death, the testator's capital in the concern was 64,000*l.* That amount, therefore, was to be credited to the testator's estate in some shape or other, and the fact of its having been credited, cannot, therefore, be conclusive. It is said, however, that, not only is the 64,000*l.* credited, but there is a transfer to the legatees from the executorship account, and this it is said is a conclusive admission of assets. But when we look at the circumstances, the fact of an account having been opened with the legatees does not seem to me to be material, for the legacies were to remain in the concern, and it was not incorrect, therefore, that the legatees should be credited. No payment on account of principal was ever made to the legatees, nor was any notice given by the legatees requiring payment of principal, and, as to one of the legatees, no communication was made to him of the account having been opened. Surely it is going too far to say, that if an executor opens an account in his books, he is on that fact alone, without any communication having been made, to be charged as on an admission of assets. There is, besides, the deed of 1851, expressly

reciting that the account had not been settled, and the 64,000*l.*, therefore, could not be treated as due from William Macintosh Hutton. That recital appears to me to prevent the entry in the account from having any binding operation.

I think that, in the peculiar circumstances of the case, these entries cannot be held to amount to an admission of assets.

Then, as to the residuary account. It is, no doubt, a strong circumstance against an executor, that he has rendered an
 * 15 account to the stamp office, taking credit in * the account for the legacies. But before the Court acts upon the inference to be deduced from such an account having been rendered, it is the duty of the Court to examine the account; and upon examining this account, we find that the 43,000*l.* (although the duty is paid on it) is not returned as absolutely due from the executor, but as the estimated value of the testator's share in the concern. The whole effect of the account, therefore, would be displaced by proof that the amount was over-estimated.

With respect to the interest, it is to be observed that the interest was not paid, but only credited in account. It is said that the testator had elected to take his brother's share of the concern, and, therefore, his share of the liabilities; but the dealing with the accounts is consistent with the testator's having elected or not having elected, and I think that he cannot be presumed to have intended to elect when he had the same right without electing.

1855. February 19.

Subsequently to the foregoing decision, and on the 19th February, 1855, Robert Rossiter Hutton, another of the sons of W. M. Hutton and one of the legatees under the will of Robert Hutton, together with the trustees of his marriage settlement, carried in a claim in the suit, to be admitted as creditors on the estate of W. M. Hutton, in respect of 4779*l.*, the balance of his legacy of 5000*l.* and interest: they stated, that in 1851, R. R. Hutton married Miss Snell; that, previously to the marriage, Mr. Snell, the father of the lady, proposed by letter to make up his daughter's fortune to 4000*l.* upon condition of Robert Rossiter Hutton bringing the like sum into settlement; that on this proposal being com-
 * 16 municated by letter to William Macintosh * Hutton, he wrote to Mr. Snell, saying that he did not consider that Robert Rossiter Hutton could enter into such a contract; that communi-

cations then took place between Robert Rossiter Hutton and William Macintosh Hutton, and the latter ultimately informed Robert Rossiter Hutton that he had consulted his solicitor, and thought that he, Robert Rossiter Hutton, was authorized to make a settlement of 4000*l.*, part of the legacy, as he was absolutely entitled to it, and he advised Robert Rossiter Hutton to arrange the payment by five yearly instalments ; that, in consequence of this, a deed was executed, to which W. M. Hutton was not a party, by which Miss Snell's property was settled on certain trusts, an additional sum being covenanted to be paid by her father, and by the same deed Robert Rossiter Hutton assigned to trustees 4000*l.*, part of the legacy of 5000*l.*, and covenanted that it should be paid by annual instalments of 800*l.*, within five years from the marriage, and interest at five per cent in the mean time. It appeared that no payment had been made under the settlement in respect of the principal sum of 4000*l.*, and that there was also due a sum in respect of interest. In respect of the balance of 1000*l.* a sum of 779*l.* still remained unpaid.

Evidence was gone into on both sides, the material portions of which, namely, the affidavits of R. R. Hutton and Mr. Snell in support of the claim, are sufficiently stated in the judgment of the Lord Justice TURNER.

The Vice-Chancellor STUART, before whom the matter came, considered the case concluded by the decision of the Lords Justices on the claims of James Frederick Hutton and Thomas Calvert Hutton, and directed the claim of Robert Rossiter Hutton and the trustees to stand as a claim only.

* From this decision Robert Rossiter Hutton and his *17 trustees now appealed.

Mr. Malins and *Mr. T. H. Terrell*, for the appeal. — They distinguished the present case from that which had been decided by the Lords Justices in December: there the question was simply one of admission of assets; here a marriage had been entered into on the faith of certain representations as to property, namely, that the legacy of 5000*l.* belonged to R. R. Hutton absolutely, though for purposes of convenience it was not to be immediately paid. They commented on the evidence, and cited *Berriefford v. Milward*. (a)

[The Lord Justice KNIGHT BRUCE referred to the decision of the House of Lords in *Jorden v. Money*. (a)]

Mr. Bacon and *Mr. Selwyn*, for the creditors having the conduct of the suit, supported the decision of the Vice-Chancellor. — They submitted that the arrangement made on the marriage was really no more than this, that R. R. Hutton covenanted to settle whatever might be coming to him, without its being at all understood that any thing would certainly come to him; that if any thing more than this had been intended, W. M. Hutton would have joined in the covenant, which he did not; and that in fact, after the communications which had taken place, all parties knew, or must be taken to have known, that the payment of the legacies was uncertain, and depended on the accounts of the business, the intention of the testator R. Hutton being, not that his nephews should have legacies of 5000*l.* each absolutely, but that they should have legacies to that amount out of the business. They

* 18 * contended that, in this view of the case, there was no ground for the claim, and that the Vice-Chancellor's decision was correct.

Mr. Baggallay appeared for the executor of W. M. Hutton.

Mr. Malins replied.

THE LORD JUSTICE KNIGHT BRUCE. — I do not see any reason for departing from the conclusion at which we arrived on the 1st of December last. I still think that it was correct; but I think also that the present case is importantly different from the case then before us. It seems to me that, making every allowance that ought to be made in the respondent's favour, for the bias under which of necessity *Mr. Snell* and *Mr. Robert Rossiter Hutton*, however respectable, depose, the just inference from the whole of the materials before the Court is, that *Mr. Snell* consented to the marriage of his daughter upon such settlements as were made, and that *Mr. Snell* and *Mr. Robert Rossiter Hutton* did execute the settlements that were executed upon the faith of a representation, in fact made by *Mr. William Macintosh Hutton* to

each of them, that the legacy of 5000*l.* was a substantial and safe legacy due and to be paid, although the payment of it might be and was deferred.

The expression of one of the rules belonging to this department of the law, which is to be found in Lord ELDON's judgment in the case of *Evans v. Bicknell*, (a) has been always deemed satisfactory and right. His language is, "It is a very old head of equity, that if a representation is made by one person to another person * going to deal in a matter of interest upon the faith of that * 19 representation, the former shall make that representation good, if he knows it to be false." If the representation, which I consider proved against Mr. William Mackintosh Hutton, was true, there is an end of the dispute; his estate owes the money. If the representation was untrue, it is not too much to say that he must be taken to have known it to be untrue, and I am therefore satisfied, that not only as to the 4000*l.* settled, but also as to the residue of the 5000*l.*, that which was not settled, namely, the 779*l.*, the father's estate is bound to make good that representation; consequently, the father's estate is a debtor for the money to the trustees of the settlement or to the son.¹

THE LORD JUSTICE TURNER. — This case appears to me to stand upon grounds wholly different from the case which was before us in December last. The question then was simply this, whether Mr. William Macintosh Hutton had bound himself by an admission of assets of Robert Hutton to the payment of the legacies to the two sons.

The question here is, whether William Macintosh Hutton has bound himself by representations made upon the marriage of his son, and which induced that marriage. Looking at the evidence, I feel, I may say, no doubt upon the case, so far as respects the 4000*l.* The statement that Mr. Snell makes, in reference to the treaty of the marriage of Robert Rossiter Hutton with his daughter, is this: he says, "Previously to such marriage, the said Robert Rossiter Hutton informed me, that his property consisted of the sum of 5000*l.*, then in his father's hands, and for which he received interest." That representation is accurate, as ap-

(a) 6 Ves. 188.

¹ See *ante*, 9 note (1).

* 20 pears by the accounts which are contained * in the books of the father, in which credit is given for interest against moneys drawn out by the son from the father. Then Mr. Snell goes on to state, that he saw Mr. William Macintosh Hutton upon the subject, and that a conversation took place between them with reference to the settlement. He says: "Some time after writing the letter last referred to (that is, the letter he had written to Robert Rossiter Hutton as to this settlement), I received a letter upon the subject of the settlement from the said William Macintosh Hutton, and he subsequently called upon me in Belgrave Road, where I was then residing, for the purpose of discussing the terms thereof, and he confirmed the statement of his son with reference to the before-mentioned legacy, and assented to the propriety and prudence of the proposed settlement of 4000*l.*, part of the amount thereof, and I stated to the said William Macintosh Hutton, my willingness to make up my daughter's fortune to a like sum of 4000*l.*, and, on my suggesting to the said William Macintosh Hutton, that his son's 4000*l.*, or some portion thereof, should be paid into the trustees' hands before the marriage, he stated that he should not like to pay the same at once, and he gave as his reasons for such non-payment, that legacies of 5000*l.* had been given by their uncle to each of his other children, and he was not under any obligation to make an immediate payment of such legacies, and he thought that he might be placed in a difficulty, if he at once paid his son Robert's legacy, because his other sons might then reasonably expect him to pay them forthwith their legacies, and, looking at the price of produce, and the general state and prospects of the market, it would not be convenient for him to pay all such legacies, as it would suddenly withdraw a large amount of capital from his business, which would be prejudicial, but he distinctly stated that I might rest quite satisfied that the money * was safe in his hands and that it would be paid at the periods we might agree upon." (a)

(a) It may be well to add to the passage above quoted by the Lord Justice that which immediately followed it; namely, "and he never stated or implied that the right of the said R. R. Hutton to the said 5000*l.* depended upon any contingency, but he gave me distinctly to understand that he was responsible to his son for the amount of the legacy, and that his son was unqualifiedly entitled to it, except that he could not call for its immediate payment by reason of the peculiar provisions of his uncle's will, and I was so entirely satisfied with the explanations and assurances given me by the said W. M. Hutton, that I was

The conversation goes on, and they come to an agreement, that this sum of 4000*l.*, part of the legacy of 5000*l.*, should be paid by five instalments of 800*l.* each, instead of according to the provisions of the will.

There, therefore, is a distinct representation by the father that the legacy of 5000*l.* to the extent of 4000*l.*, should be forthcoming for the purpose of the settlement by five annual instalments of 800*l.*, and upon that the son enters into a covenant, not that he will pay it, but that it shall be paid by the instalments that are stipulated for, which had formed the subject of agreement between the two fathers. I think, therefore, upon these representations there is no doubt as to the 4000*l.*, that the father had made himself liable for it.

* Then comes the question as to the 779*l.* I have felt * 22 more doubt upon that, looking to the evidence of Mr. Snell, which refers merely to the conversation as to the 4000*l.*, and does not touch the balance of the legacy beyond that amount; but, upon looking to the affidavit of Mr. Robert Rossiter Hutton, I find he distinctly states this: he says, "I acted in accordance with the arrangement made between my father and the said Edward Snell, and under the full reliance that my father could pay the money pursuant to such arrangement, otherwise I should not have entered into such an engagement, because I know that I had no means, and that I was not likely to possess the means, of performing it except through my father's instrumentality; and in the various communications which I had from time to time with my father upon the subject of the settlement, and otherwise in connection with my worldly prospects, he never at any time intimated or implied that my right to the said legacy of 5000*l.*

content to leave the matter as it stood, and I did not press him to give any security for the payment of the money, but I discussed with him the times at which it should be paid, and I expressed my willingness to be bound to pay the money which I had undertaken to advance towards my daughter's fortune, at periods corresponding with the periods at which the 4000*l.* belonging to the said R. R. Hutton was to be paid, and I was quite prepared to agree to pay my money before the marriage took place, if the said W. M. Hutton had agreed to pay his son's money at the like time, but the said W. M. Hutton appeared desirous of postponing the periods of payment as much as possible, and he made a suggestion that the 4000*l.* should be paid by five yearly instalments of 800*l.* each, to which proposal I assented, and the settlements were subsequently prepared upon the basis of that arrangement."

depended upon any contingency, but on the contrary, he invariably treated the matter as though the money were in his hands, and that I had an absolute and positive right to the same, although I had no right to require immediate payment thereof."

It must, I think, be taken upon that statement (there being no evidence to contradict it), that there were representations by the father that the whole 5000*l.*, and not merely the 4000*l.* which was put into settlement, would be forthcoming; and there being such representations, it must, I think, equally be assumed that the marriage took place, not merely upon the contract for the payment of the 4000*l.* within the time agreed upon, but also upon the representation that the son would be entitled to the balance in respect of the 5000*l.*

Observations have been made with reference to what
* 23 * passed in the House of Lords in the case of *Jorden v.*

Money. (a) I have looked at the report of that case, and I find that it turned, as I supposed it did, upon the facts. The principle of law upon the subject does not seem to have been questioned. Whether it was rightly or wrongly applied to the facts is not the question we have to consider; but I observe that the Lord Chancellor, in giving judgment, gives an opinion unfavourable to the present respondents. His Lordship says: "There are two grounds upon which it is said that the parties have lost their right to enforce the bond. The one is, that previously to William Money's marriage Mrs. Jorden, then Miss Marnall, represented that the bond had been abandoned, that she had given up her right upon it, and upon the faith of that representation the marriage was contracted. And then it is said, that, upon a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where upon the faith of such represen-

(a) 5 H. L. Cas. 185.

tations marriage has been contracted." His Lordship then refers to the cases upon the subject, and concludes his observations upon that point thus: "These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I should be in the last degree sorry that any opinion or decision to which I am a party should lead to a notion, * that I in the * 24 slightest degree question their propriety. Nay more, I think that the principle has been carried and may be carried much further, because, I think, it is not necessary that the party making the representation should know that it was false.¹ No fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good."

I quite adopt that principle: I believe it to be consistent with the law of the Court. I think that here the parties were led into the contract of marriage by the representation made by the father, and consequently that the father's estate must give effect to that representation. The trustees of the settlement must therefore be admitted creditors for 4000*l.*, and the son for 779*l.*, the balance due upon it.

THE LORD JUSTICE KNIGHT BRUCE. — And any interest that may be due.

¹ Kerr Inj. 34; *Brown v. Castles*, 11 Cush. 348, 349, 350. In order to create an estoppel *in pais*, the declarations or acts relied upon must have been accompanied by a design to induce the party who sets up the estoppel to act upon them. *Andrews v. Lyons*, 11 Allen, 349; *Turner v. Coffin*, 12 Allen, 401; see cases cited *ante* 9, note (1).

1855. January 22. Before the LORDS JUSTICES.

Where an infant plaintiff on coming of age repudiated the suit, *held*, that a defendant who had brought deeds into Court was entitled to have them returned, and that the solicitor of the next friend of the infant had no lien on them for his costs, although the defendant had by his answer admitted the infant's title to the estate to which the deeds related.¹

THIS was an appeal from the refusal of a motion by Vice-Chancellor KINDERSLEY, reported in the 3d volume of Mr. Drewry's Reports. (a) A petition of the solicitor to the next friend of the infant plaintiff came on by order to be heard originally by their Lordships with the appeal motion.

The suit was instituted on the 21st of December, 1847, by Robert Meadows Dunn, an infant, by William Morrish, his step-father, as his next friend, for an account of rents and profits alleged by the bill to have been wrongfully received by William Dunn, as the trustee of a will, under which, however, according to the plaintiff's case, the estate did not pass. The bill also sought to have the title-deeds preserved and protected in Court for the benefit of the infant.

The defendant William Dunn by his answer admitted that the plaintiff was tenant in tail in possession of the estate, and as such entitled to the possession of the deeds, and he set forth in a schedule to the answer a list of them.

On the coming in of the answer, a motion was made on behalf of the plaintiff that the deeds might be deposited in Court, * 26 with liberty to the plaintiff to inspect them, * which was ordered accordingly, and the defendant on the 20th of April, 1848, deposited the deeds in Court.

On the 16th of December, 1854, no step in the suit having been taken in the mean time, the defendant William Dunn moved for the delivery out of Court of the deeds. This motion was supported by an affidavit of the plaintiff stating that he had lately attained his majority, and that he had thereupon repudiated and still repudiated the suit.

(a) Page 17.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 81, 2 *ib.* 1838, 1839, 1842.

The Vice-Chancellor ordered the deeds to be delivered out accordingly, and the present motion, which was by way of appeal from that order, was made in the name of the plaintiff and of the next friend.

The petition which came on with the appeal was that of Mr. Hinton, the solicitor to the next friend, and it sought a declaration that the petitioner had a lien on the deeds for his bills of costs in the suit incurred before the plaintiff came of age.

The order of the Vice-Chancellor had been executed by the delivery up of the deeds.

Mr. Bagshawe and Mr. Bagshawe, Jr., in support of the appeal motion. — The deeds belonged to the infant plaintiff, and, as the suit was his until he repudiated it, the defendant cannot have the deeds without satisfying the claims of the plaintiff's solicitor. The plaintiff is now manifestly colluding with the defendant to evade the solicitor's just demand.

* *Mr. Karslake*, for the plaintiff, and *Mr. Speed*, for the * 27 defendant, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — I think that this motion must be refused, and that the question of costs should be considered when we have heard the petition.

THE LORD JUSTICE TURNER. — The order of the Vice-Chancellor appears to me to be perfectly correct. The case is this, — the bill is filed in the name of the infant by a next friend for the purpose of recovering the rents of real estate of which the infant was tenant in tail. The answer of the defendant comes in. An order is made under which the deeds are brought into Court. The infant comes of age, and he and his next friend then say it is not meant to go on with the suit. Thereupon the defendant says, I brought the deeds into Court; let me have them. He is warranted in saying, that, if the suit is not to be proceeded with, the order for depositing the deeds in Court is satisfied. They should be delivered, not to the plaintiff or his next friend, but to the defendant who has deposited them in Court.

Mr. Bagshawe and Mr. Bagshawe, Jr., in support of the petition
[21]

of the solicitor, referred to an unreported case of *Bovil v. Podmore* before Lord LYNDHURST, on the 25th of July, 1829, which was a suit for a specific performance of an agreement to purchase an estate, and in which they said an order was made upon a petition of the solicitor of the plaintiff, and an affidavit stating that the suit had been compromised, providing for the plaintiff's costs, and that he was in danger of losing them.

* 28 * They said that the Court had in that case ordered that the defendant, who was the purchaser, should not pay to the plaintiff, or any other person, the purchase-money; and that the plaintiff should not receive the purchase-money or convey the estate to the purchaser, or any other person, until the petitioner's lien for his costs had been paid or satisfied, or till further order of the Court.

They also referred to *Ex parte Bryant*, (a) *Ex parte Rhodes*, (b) *Davies v. Lowndes*, (c) *Welsh v. Hole*, (d) *Friswell v. King*, (e) *White v. Pearce*, (g) *Mandeno v. Mandeno*. (h)

THE LORD JUSTICE KNIGHT BRUCE.—Whether a lien might have been acquired by the solicitor it is not necessary to say, for I am clearly of opinion that a lien was not acquired by him, and that the order made by the Vice-Chancellor for the delivery of the deeds was a correct order. It appears that before the petition was presented, or before it was served, the deeds were delivered to a mortgagee for value, with whom they have remained ever since. I am of opinion that no order can be made in favour of the petitioner in the circumstances of the case, whether under different circumstances he could have obtained one or not.

THE LORD JUSTICE TURNER.—It is unnecessary to consider whether, under any circumstances, the solicitor could have acquired a lien. It is sufficient to say that he has certainly not acquired a lien under the circumstances of the present case.

* 29 He * had no general lien upon these title-deeds before they were deposited in Court. The bill was filed on behalf of

(a) 1 Madd. 49.

(b) 15 Ves. 539.

(c) 3 C. B. 808.

(d) 1 Dougl. 238.

(e) 15 Sim. 191.

(g) 7 Hare, 276.

(h) Kay, App. ii.

the plaintiff, then an infant. In the course of the suit the deeds were deposited in Court for inspection merely. The infant, on coming of age, repudiated the suit, and that repudiation, as I think, related back to the commencement of the suit, overriding all that had been done in it.¹ The deeds, therefore, which had been brought into Court in the course of the suit, and in obedience to an order in it, must go back to the defendant by whom they were brought in. The Court cannot interfere to prevent the defendant from delivering them to the plaintiff. It was in the power of the defendant to have delivered these deeds to the plaintiff if the suit had never been instituted; and the effect of the mere institution of the suit, afterwards repudiated, could not be to deprive him of that power. It is, in my opinion, clear that no lien has been acquired on these deeds, and that the petition, therefore, must be dismissed, but, under the circumstances, without costs.

THE LORD JUSTICE KNIGHT BRUCE. — It seems to us that the costs of the motion must be paid by the next friend, by whom it was made.

* LANGTON v. LANGTON.

* 30

1855. January 24. Before the LORDS JUSTICES.

Cestuis que trustent under a will instituted a suit to have the trusts carried into effect and to set aside a mortgage of a part of the trust estate made by the trustees. By the terms of the mortgage the mortgagees were not entitled to take possession except upon a prescribed notice. Before this notice had been given the plaintiff had obtained an order for a receiver, and also an order to take proceedings with respect to a claim adverse to the interests of all the parties to the suit. Afterwards a decree was made in the suit, establishing the validity of the mortgage and directing a sale, in which all parties were ordered to join. The mortgagees neither consented to nor opposed the interlocutory orders being made, nor did they at the hearing ask for a dismissal of the bill as against themselves, or oppose the insertion of the direction for a sale. They afterwards applied to have the receiver discharged and to be let into possession, and gave the notice prescribed by the mortgage. On their application being refused, they appealed from the refusal, and at

¹ 1 Dan. Ch. Pr. (4th Am. ed.) 79.

the same time from so much of the decree as rendered it obligatory on them to concur in the sale.

Held, that they had not adopted the proceedings in the suit, but were entitled to priority over the costs of it and of the action,¹ and also to have the receiver discharged and the decree varied so far as it bound them to join in the sale.

Held, also (the testator's estate in the subject of the security being equitable), that the Court might direct possession to be delivered to the mortgagees.

THESE were appeals from a decree and an order of Vice-Chancellor Wood.

Bennet Langton by his will, dated the 25th of June, 1800, devised his moiety of the navigation of the river Wye, otherwise Wey, and also all other his real estates, whatsoever and wheresoever (except the manor of Langton and other estates comprised in a settlement), unto his wife the Countess Dowager of Rothes, her heirs and assigns, upon trust during her life, by mortgage or sale of all or any part or parts of the rents, charges, and hereditaments thereby devised, to raise such sum or sums of money as she should think expedient (in aid of his personal estate not specifically bequeathed) for the payment of his debts (except a mortgage debt of 14,000*l.* therein mentioned, to be secured on the manor of Langton, which he desired should remain a charge thereon during the life of his wife), and also in payment of a legacy of 9000*l.* which he bequeathed to his younger children, as well as all such other pecuniary legacies as he might bequeath. And he

* 31 declared his will, that, from and immediately * after the decease of his wife, her heirs, executors, and administrators should stand and be seised and possessed of all such parts (if any) of his real estates, thereinbefore devised to her, as should remain unsold, and of all such parts, if any, of his residuary personal estate as should remain undisposed of or outstanding, and also of the stocks, funds, and securities, if any, which should have been purchased or acquired by the surplus moneys arising from the sale of his real estates, upon trust, with all convenient speed after her decease, by sale or mortgage of such remaining real estates, and by calling in and converting into money such remaining or outstanding personal estate, and such stocks, funds, and securities as aforesaid, to raise and levy money sufficient for the payment and satisfaction of, and therewith accordingly to pay, satisfy, and dis-

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1390.

charge the said sum of 14,000*l.* then due on mortgage of the estates comprised in the settlement, as well as all such of his other debts and such of the pecuniary legacies bequeathed by his will, or any codicil or codicils thereto, as might then remain unpaid, with all interest due for or on account of the same respectively; and from and immediately after the full payment, satisfaction, and discharge thereof respectively, he gave all the then residue and surplus of the said trust estates, effects, and premises, subject to such annuities as should be then subsisting, unto George Langton, his heirs, executors, administrators, and assigns, for his and their own absolute use and benefit.

The testator died in 1801. The Countess Dowager of Rothes survived him, and died in 1820. In June, 1825, her heir borrowed 7000*l.* upon a mortgage of the testator's moiety of the Wye navigation. This mortgage, which empowered the mortgagees to enter into possession, on giving three months' notice, was in 1840 transferred to the appellants.

* The present suit was instituted in 1842, by the heir-at-law * 32 of the testator, who was also, under the will of the widow, one of the trustees under the testator's will, and was entitled under the settlement to the estates charged with the mortgage of 14,000*l.* The defendants were: the co-trustees of the plaintiff,—the surviving younger children of the original testator and the representatives of deceased younger children,—and the appellants, as mortgagees.

The bill stated that the widow had, out of the assets of the testator, paid off or satisfied to some of his younger children upwards of 4121*l.*, part of the legacy of 9000*l.*, and that the plaintiff, who had only lately attained the age of twenty-one years, had, on attaining that age, requested his co-trustees to concur in executing the trusts of the will for the sale or mortgage of the devised estates, and to apply the proceeds of such sale or mortgage in payment of the mortgage debt of 14,000*l.* and interest, in exoneration of the plaintiff's estates at Langton; but that the co-trustees objected to such sale or mortgage on various grounds. The bill charged that part of the mortgage loan of 7000*l.* was improperly applied in making a payment of 733*l.* to one of the defendants, and ought to be refunded and made good to the trust estate of the testator; and that other part of the 7000*l.* was raised and applied

for the purpose of making purchases by way of additions to or improvements of the testator's share or interest in the river Wye, and that the parties advancing the moneys so applied, had full notice thereof at the time of making such advance. The prayer was, that the will might be established and the trusts carried into effect, and that it might be declared that the plaintiff was entitled to the benefit of the trust contained in the will, for payment and satisfaction of the mortgage debt of 14,000*l.* and interest,

* 33 * and to have the same raised and paid by a sale or mortgage of the moiety, and other share, estate, and interest theretofore of the testator of and in the navigation of the river Wye, and the lands, tenements, rights, tolls, rents, and profits thereof, and of all additions thereto and improvements thereof, which had been made or acquired since the death of the testator, and that all proper accounts might be taken of the several incumbrances or charges thereon, and that their respective priorities might be ascertained and declared; and that an account might be had of the receipts of the trustees on account of the trust estate, and of their application; and that an account might be also taken of all other real or personal estate of the testator, possessed or received by the younger children of the testator, or their respective legal personal representatives; and that the younger children, or their representatives, might be charged personally with what might be found to have been received by them respectively, on the taking of such last-mentioned account, and might be decreed to refund and make good the same as part of the trust estates of the testator; and that a receiver might be appointed to collect and get in the rents, tolls, profits, and income of the trust estates and premises, and to conduct and manage, or assist in conducting and managing, the Wye navigation, estates, and premises.

On the 8th of December, 1843, a receiver was appointed on an interlocutory application of the plaintiff, which was not opposed by the appellants the mortgagees, and the order then made directed the receiver, out of the rents and profits and the tolls of the navigation, to keep down the interest on the 7000*l.* and 14,000*l.* and certain other charges, without prejudice to the question, how such payments made by him were ultimately to be borne.

* 34 * On the 5th of December, 1845, the plaintiff without opposition obtained another interlocutory order, directing

inquiries as to the propriety of taking proceedings against certain tenants of the dean and chapter of Windsor, who were interfering with the navigation.

On the 30th of July, 1846, a decree was made confirming the appointment of the receiver, and continuing the inquiries directed by the other interlocutory order, and declaring that the will ought to be established, and the trusts thereof performed and carried into execution, and it also directed accounts, and that the Master should inquire and state to the Court, whether there were any and what mortgages, charges, or other incumbrances that affected the whole or any and what part or parts of the real estates, and should ascertain and state what was due for principal, interest, and costs respectively, in respect of each and every of such mortgages, charges, or other incumbrances as he should find, affecting the estates or any part thereof, and in whom the same respectively were then vested; and it was ordered, that the Master should ascertain and state the respective priorities of the several mortgages, charges, and other incumbrances which he should find affecting the said estates or any part thereof; and it was ordered, that the Master should inquire and state to the Court what would be the most beneficial mode of selling or disposing of the moiety of the Wye navigation, and other the real estates, if any, of the testator.

Proceedings were taken under the direction of the Court, against the dean and canons of Windsor, with whom a compromise was effected under an order obtained for that purpose.

The Master made a separate report, finding that the *appellants' mortgage was the first incumbrance on the *35 property comprised in it, and this report was absolutely confirmed on the 9th of November, 1849.

On the 12th of January, 1850, an order was made on the petition of some of the *cestuis que trustent*, directing the receiver to pay out of the tolls one moiety of the costs of the above proceedings against the dean and chapter of Windsor, and of the compromise and all the costs incurred in the suit in relation thereto, reserving the question how such costs were ultimately to be borne.

The appellants were served with notice of the applications for the orders relating to the action and compromise, but did not intervene.

On the 14th of February, 1853, an order was made by the Vice-

Chancellor, on exceptions and further directions, directing, that the receiver, and the accounts directed by the decree of the 30th of July, 1846, should be continued; and that the moiety of the Wye navigation (among other property) should be sold by private contract or public auction, in such lots as in the Master's report mentioned, or in such other lots or otherwise as should be approved of; and a reserved bidding was to be fixed, and the proceeds to arise from the sale of the share in the river were to be paid into Court to the credit of the cause.

The appellants did not oppose the insertion of the power of sale in the order, but finding, in the course of the proceedings under it, that the property had become depreciated, and that their security was deficient, so that there was no prospect of an advantageous sale, they presented a petition, seeking to have the receiver discharged, and to be let into possession.

* 36 * The petition came on to be heard on the 5th of August, 1854, when the Vice-Chancellor ordered that the receiver should pay the costs, charges, and expenses directed to be taxed and paid by him by the order of the 12th of January, 1850, out of the first moneys that were, in or should come to his hands as such receiver in preference to the claims of the mortgagees the appellants, and that the further consideration of the petition should stand adjourned with liberty to any parties to apply.

From this order, and also from the order of the 14th of February, 1853, the mortgagees appealed, having given the notice required by their mortgage.

Mr. Giffard and *Mr. Gordon*, for the appellants. — They referred to *Davis v. The Duke of Marlborough*, (a) *Paynter v. Carew*, (b) *Barnes v. Racster*, (c) *Tipping v. Power*, (d) *Hepworth v. Heslop*. (e)

Mr. Willcock and *Mr. Greene*, for the plaintiffs, and *Mr. Rolt* and *Mr. Bazalgette*, for some of the defendants, argued in support of the orders under appeal. — They referred to *White v. Bishop of Peterborough*, (g) *Kenebel v. Scrafton*, (h) *Wontner v. Wright*, (i) *Armstrong v. Storer*, (k) and *Carr v. Henderson*. (l)

(a) 2 Swanst. 108.

(e) 3 Hare, 485.

(i) 2 Sim. 543.

(b) 2 Eq. 496.

(g) Jacob, 402.

(k) 14 Beav. 535.

(c) 1 Y. & C. C. C. 401.

(h) 13 Ves. 370.

(l) 11 Beav. 415.

(d) 1 Hare, 405.

Mr. Giffard, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Whatever may be meant by the expression that a defendant has adopted a suit, I think that there has * been no adoption of the present suit by the * 37 appellants. It is one which (among other things) sought to impeach their security. They defended it, and, as it appears, effectually. A receiver was appointed at the instance of the plaintiff, who was a *puise* incumbrancer. When the receiver was appointed, and down to a recent period, the appellants, who were the first incumbrancers, were not entitled to take possession, because, by the terms of their security, they were obliged before so doing to give three months' notice after default had been made in payment of the mortgage money. The cause proceeded against these mortgagees and others, they not consenting to the proceedings, but not resisting them; and in this way a report has been made and confirmed finding the appellants to be first incumbrancers. Besides this fact, now incontrovertible, there is the additional circumstance, that they have taken the step which entitles them to assume possession of the mortgaged property, and they come to the Court, seeking to discharge the receiver, and to be placed in possession of it. In my opinion, this, which is a *prima facie* right on their part, remains a plain right, after considering and giving due weight to every fact in the case.

It seems to me, therefore, that the receiver ought to be discharged, and, considering that the title is only equitable, and that the plaintiff has concurred in taking and obtaining confirmation of a report, which has found the appellants first incumbrancers, the Court may, for the sake of all parties concerned, go the length, not only of enabling the first mortgagees to obtain possession, but of directing possession to be given to them, taking care that the order is confined to the property, clearly within their mortgage, so as to leave open the question as to the wharf which has been said at the bar to be of so much importance to the navigation, and as to which we * have no means of deciding any thing * 38 at present. I think that the better mode will be to designate the property by reference. The appellants will have possession of that property, they undertaking to assume the possession, with all the rights, and subject to all the liabilities of mortgagees in possession.

It is then said, that certain expenses have been incurred in protecting the property from adverse claims, and that these expenses must be paid. No doubt, they must be paid, but the question is, by whom? The proceedings in which they were incurred were not of the first incumbrancers' seeking; they were passive with regard to them, and had a right to be so. They treated them as being the proceedings of others interested in the property, and taken for those persons' own interest.

I think that the petitioners were right in their contention, and that, whoever may be bound to pay, they are not. They say, "We did not enter into the contest. We saw you engaged in a dispute likely to be beneficial to you. It might possibly be so to us likewise, but we took no part in it, you must therefore provide for the costs as best you may."

It was said also, that some part of the costs of the suit ought to be paid by the appellants, because they submitted to take the benefit of the proceedings. As to some of these, and especially as to the expenses of putting up the property for sale, it may possibly be right, that they should pay part of those expenses, but the cause will come on for further directions, or further consideration, and the Court can then dispose of this as justice shall require.

* 39 * As to the costs of the receiver, so far as they have not been paid, it is unnecessary to decide whether the first mortgagees ought to pay them, for they are willing to do so, and it appears, that there is a small balance in the receiver's hands, which the appellants do not wish to take from him. Nothing therefore need be said about the receiver's costs on the one hand, nor as to his paying over any balance on the other.

I have referred to the sale directed by the decree. The decree is so framed as to make it compulsory on the first mortgagees to concur in the sale. They do not, however, seem to have conducted themselves so as to be obnoxious to such a direction. It seems to me that the direction ought to be in the usual way, that the property shall be sold free from the mortgage, if the mortgagees consent, or subject to the mortgage if they do not. The costs of the petition before the Vice-Chancellor, and of the petition here, will be costs in the cause.

THE LORD JUSTICE TURNER. — The first question in this case is,

whether the decree for sale ought to have been in such a form as to compel the appellants to concur in the sale. The decision on this point will materially influence the question as to letting the appellants into possession, for it may not be right to let a mortgagee into possession, when there is a decree in force for an immediate sale in which he is bound to concur. I am of opinion, that, as against a mortgagee with a paramount title, no sale can be ordered without his express consent, except subject to his mortgage.¹ The decree, therefore, must be varied, by substituting the usual direction as to the sale.

The question then is as to the continuance of the *receiver, * 40 and this question involves two points: first, whether the Court ought to subject the mortgagees to the costs of defending the estate against the claim of the tenants of the dean and canons of Windsor before letting them into possession; and, secondly, whether they ought to be let into possession before contributing to the general costs of the suit. As to the first of these points, if there had been no suit, and the parties entitled to the equity of redemption had defended the estate against these claims, and the result had been beneficial to the estate, though the result being beneficial to the estate would have been therefore beneficial to the mortgagees, it is nevertheless clear that there would have been no claim against the mortgagees in respect of those costs. It is equally clear that if the mortgagees had not been parties to the suit the Court would have provided, as it has done in the present case, for the payment of the interest on the mortgage, but would not have thrown any part of these costs on the mortgagees. Is this altered or qualified by the fact of the mortgagees having been made parties? They were made parties on the ground that their security was in part liable to be impeached, and they were brought before the Court to try that question. It turned out that there was no ground for impeaching their security, and that they were entitled to priority. It is difficult to say that the filing a bill to impeach their title, an attempt which failed, can make them liable to any expenses to which they would not otherwise have been liable.

It has been said that they ought to have asked to be dismissed at the hearing, but I agree with *Mr. Giffard*, that it would have

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1264, 1265.

been difficult to succeed in such an application, and moreover the plaintiff might, if he thought fit, have applied to dismiss the bill against them. The fact is that the mortgagees have been

* 41 brought here *for the convenience of the other parties.

There was no good ground for bringing them here, except the allegations that their mortgage was liable to be impeached, and they have been kept here for the advantage of the other parties, not for their own.

What have been the proceedings in the cause? A receiver was appointed expressly, without prejudice to any question in the cause, and particularly to the question by what funds or estates the payments directed to be made by him were ultimately to be borne. The decree continued this order, with the reservation contained in it, and the order providing for the costs was also without prejudice. All questions therefore have been reserved.

Then, as to the second point, there has been a reference to the Master as to the expediency of taking proceedings against the tenants of the dean and canons of Windsor, and afterwards a reference as to a compromise of those proceedings, and it has been said that the mortgagees have taken the benefit of all this. Every mortgagee takes the benefit of expenditure on the estate by the persons entitled to the equity of redemption, but it cannot be said that because he derives benefit from it he is liable to pay for it. When these proceedings commenced there was a surplus income, and the proceedings originated with the parties entitled to it. If the surplus had continued the mortgagees would not have been liable to the costs. Are parties who would have had no claim against the mortgagees, if the original state of things had continued, to acquire a claim from a change of circumstances? I think not.

I think that there is no claim on the estate as against the mortgagees for these costs, or for the general costs of the suit, * 42 and that the mortgagees are entitled to be let *into possession of the property comprised in their security.

The Lord Justice KNIGHT BRUCE said he was persuaded that if the facts of the case had been brought before the Vice-Chancellor as fully as before their Lordships, his Honor would have arrived at the same conclusion.

The order of the 5th of August, 1854, was varied, and as varied

directed among other things that the receiver should be discharged as to the property comprised in the appellants' mortgage; that the appellants, as being the first mortgagees, should be let into possession of the property comprised therein, they undertaking thereout, and so far as the rents or tolls, or shares of rents or tolls therein mentioned would extend; to pay an annuity of 100*l.* and a moiety of a rent-charge of 49*l.* The order of the 14th February, 1853, was also varied, among other things, by directing that the premises comprised in the appellants' security should be sold subject to that security if they did not consent, and freed from it if they did consent.

* In the Matter of THE DOVER, HASTINGS, AND * 43
BRIGHTON JUNCTION RAILWAY COMPANY, and of
the JOINT-STOCK COMPANIES' WINDING-UP ACTS.

CAREW'S CASE (No. 2).

1855. February 19. Before the LORDS JUSTICES.

By the subscribers' agreement of a provisionally registered railway company, prepared by the direction of some of the persons who were named in it to be managing directors, the persons made parties to the deed of the first part (the subscribers) covenanted to indemnify the persons therein named as managing directors (who were expressed to be parties of the third part, as distinct parties, and also to be among the parties of the first part) from all payments, losses, and expenses incurred or to be incurred by them in the formation or management of the concern. No one of the persons nominated as managing directors executed the deed or paid any money. One of them died before any subscriber executed the deed, and two others never consented to act. On the company being wound up, *held*, that there had been material misrepresentations of facts on the part of those who caused the deed to be prepared and submitted to the subscribers for execution, and that such persons nominated as managing directors as could be shown to have acted, were primarily liable to calls for the payment, whether of the debts of the company or of the costs of winding up, and that until their liability was exhausted, the subscribers who had signed the deed as parties of the first part, could not be called upon to contribute.

Held, also, that the subscribers were entitled to insist on this defence without taking a substantive proceeding to set aside the deed.

Held, *per* Lord Justice TURNER, that, inasmuch as the covenant contained in

the deed to indemnify the managing directors, was entered into by the subscribers on the faith of its being entered into by the managing directors also, there arose, upon the failure of the directors to execute it, an equity in favour of the subscribers to have the deed delivered up to be cancelled, or, at all events, to insist that it should not be enforced against them.

THIS was a motion by Mr. Carew and others, on behalf of themselves and all others the contributories of the company, whose names were included in class 2 of the list of contributories, that they might have leave to appeal against the settlement by the Master of the list of contributories, so far as their names were included therein, and that the order made by Master BLUNT on the 10th of January, 1855, whereby he ordered that a call of 4*l.* per share should be made on all the contributories, and that each of the contributories in class 1 should be treated as liable to the call in respect of forty shares; and another order of Master BLUNT, of the same date, by which he ordered that a call of 60*l.* should * 44 be made on each of the contributories for payment * of the costs, charges, and expenses of, and incidental to, the winding up of the company, might be discharged or varied.

The material facts of the case were the following:—

The company was projected in 1845. The subscribers' agreement was prepared and engrossed in October of that year. It purported to be made between the subscribers who executed the indenture, being severally subscribers to the undertaking of the first part, the trustees of the second part, and fifteen persons (among whom were Mr. Frewin, Mr. Dann, and Mr. Potter), therein named as managing directors of the third part, and who were therein further described as "being some of the parties thereto of the first part." The indenture, among other things, recited as follows:—

"And whereas, the parties hereto of the third part have hitherto acted as managing directors, and taken all necessary steps for the formation of such company, and have proposed that the capital of such company should be the sum of 300,000*l.* sterling, divided into 15,000 shares of 20*l.* each; and whereas the parties hereto of the first part have agreed to become respectively the holders of the number of shares in the said company affixed to their respective names, at the foot of these presents, and have at or before the execution of these presents respectively paid into the hands of certain bankers of the said company, appointed by the parties

hereto of the third part, the sum of 2*l.* 2*s.* per share, in part of such shares and by way of deposit thereon, the receipt of which said sum of 2*l.* 2*s.* per share by the said bankers the said parties hereto of the third part do hereby respectively acknowledge.” Then followed the witnessing part, by which the parties of the first part severally covenanted with the parties of the second part * “in manner expressed in the several clauses herein * 45 expressed and numbered respectively 1 to 12.”

The first clause provided, that “the several parties hereto of the third part, or the survivors or survivor of them, shall constitute and be the managing directors of the company.” The deed then contained the clauses usual in subscribers’ agreements, and, amongst others, a clause providing that the holding of not less than forty shares should be requisite as a qualification for being a managing director. The ninth clause contained the following covenant of indemnity: “that the parties hereto of the first part shall and will save, defend, keep harmless, and indemnify the said managing directors, and each, and every member thereof, of and from all payments, loss or losses, costs, charges, damages, and expenses, which such managing directors, or any member thereof, have or hath already incurred or become liable to, in or in reference to the formation of the said intended railway, or the establishment of the company, before or since the provisional registration thereof, or shall or may incur, bear, pay, sustain, become liable for, or be put into, in the exercise and execution of the powers and authorities hereby vested in them or him as such managing directors or director; and that the several sums of money so deposited as aforesaid, or hereafter to be deposited by the parties hereto of the first part, in respect or on account of the respective shares of the parties hereto of the first part in the said company, shall be charged and chargeable with such payments, losses, costs, charges, damages, and expenses; and the managing directors for the time being of the said company shall be at liberty to apply all or any portion of such sums of money in payment and discharge of such sums, losses, costs, charges, damages, and expenses.”

* The deed bore no date, but was executed by nineteen * 46 subscribers, at the dates placed opposite their respective names, as parties executing, the first of such dates being the 22d October, 1845, the last the 4th November following.

The aggregate amount of capital agreed to be subscribed for by the subscribers so executing was 9200*l.*, in respect of 450 shares, upon which they paid up 715*l.* for deposits, pursuant to the agreement.

None of the persons named in the deed as managing directors of the third part ever executed it, or took shares, but most of them accepted the office of managing directors, and acted in such office.

It appeared, however, that on the 11th October, 1845, before the deed had been executed by either of the subscribers, Mr. Frewin had expressly refused to execute it, or to act as managing director; and requested that his name might be struck out of the agreement. This was not done, but there was satisfactory evidence that Mr. Frewin never acted as director.

There was no evidence that either Mr. Dann or Mr. Potter had acted as director.

An order to wind up the affairs of the company having been made, the Master, in settling the list of contributories, divided them into two classes: viz., class No. 1, consisting of the persons named in the deed as managing directors, except Messrs. Frewin, Dann, and Potter; and class No. 2, consisting of the nineteen persons who had signed the agreement as subscribers.

The members of class No. 1 were named as contributories * 47 * in respect of forty shares each, being the number qualifying to be a managing director.

In June, 1853, the Master made an order for a call on the contributories in class No. 2 exclusively, on the ground that, by reason of the covenant of indemnity in clause 9 of the subscribers' agreement, they were the parties primarily liable to pay the debts of the company.

This order was afterwards discharged by the Lords Justices, under the circumstances stated in the report of the appeal upon it to them; see *Carew's Case*. (a)

The matter was then taken back to the Master for further consideration, when he made the orders under appeal.

The appeal motion was, by desire of the Vice-Chancellor, brought on for hearing before the Lords Justices in the first instance.

In the course of the argument, the appellants did not press for any decision upon the first object stated in the notice of motion, i.e., for leave to appeal against the settlement of the list of contrib-

(a) 5 De G., M. & G. 94.

utories, if relief were given them upon the other two points; and eventually it became unnecessary to decide upon that branch of the motion, upon the validity of the orders for calls.

Mr. Chichester and *Mr. Dickinson*, with *Mr. Malins*, for the appellants. — Looking to the small amount of capital subscribed for, and the facts that none of the parties to the deed of the third part signed the deed of settlement, and that some of them * never acted nor consented to act as managing directors of * 48 the company; the recitals of the deed, which accord with the statements in the prospectuses previously circulated by the managing directors, and must be considered as having been prepared under their direction, can be regarded only in the light of misrepresentations knowingly made, by those who acted as directors, and fraudulent as against the subscribers of the first part. The deed, therefore, is invalid as against the appellants, at all events, as between them and the managing directors, who ought, therefore, to be held primarily liable, in exoneration of the appellants, to the payment of all calls, whether for debts or costs. They cited *Bright v. Hutton*, (a) *Ex parte Carew*. (b)

Mr. Roxburgh, for the official manager, referred to *Hunter's Case*, (c) *Underwood's Case*, (d) upon the question of making a call for costs equally.

Mr. W. W. Mackeson, for *Mr. L. Mackeson*, one of the managing directors, cited *The King v. Houghton-le-Spring*, (e) as to the relative liabilities of the two classes of contributories; *Preece and Evan's Case*, (g) and *Gay's Case*, (h) as to the form of the call for costs. He urged that it had not been shown that *Mr. L. Mackeson* knew the representations contained in the recitals of the deed to have been untrue, or that the appellants had been induced to execute the deed on the faith of such representations; in which case the fact that such representations were untrue was immaterial. *Sugden's Law of Property*. (i)

(a) 3 H. L. Cas. 341.

(d) 5 De G., M. & G. 677.

(b) 5 De G., M. & G. 94.

(e) 2 B. & Ald. 375.

(c) 1 Sim. (N. S.) 435.

(g) 2 De G., M. & G. 374 [and cases in note (1)].

(h) 1 De G., M. & G. 347, [and cases in note (1)] 358.

(i) Page 597.

- * 49 * *Mr. H. Stevens*, for *Mr. Cory*, another of the managing directors.

THE LORD JUSTICE KNIGHT BRUCE. — Some at least, if not all, of the gentlemen comprised in class No. 1 of the contributories, must be considered as having, not necessarily with any wrong intention, but must, I say, be considered as having made to all those comprised in class No. 2, upon and before the occasion of the payment of their contributions, and of their execution of the deed respectively, the representations embodied in this deed, which must be taken to have been prepared under the direction of the gentlemen comprised in class No. 1, or some of them, and as embodying the representations made by them or some of them. [His Lordship here read the recitals set out above, and the clause appointing the persons who were parties of the third part to be managing directors.]

Now, in the first place, it appears that the whole capital of 300,000*l.* was never subscribed, and the deed was never executed for sums even approaching to that amount, and not one of the gentlemen named as managing directors ever executed it at all. This might, under some circumstances, be immaterial; but the fact appears to be, that before the gentlemen who did execute the deed had executed it, *Mr. Frewin*, one of the gentlemen named as managing directors, had refused to be so. He never was so; and as to two others, *Mr. Dann* and *Mr. Potter*, it has not been proved that either of them ever acted as such, or consented to be so. The result of the evidence would seem to be that neither of them did consent.

There was, therefore, with or without a wrong intention, a
* 50 material misrepresentation in point of fact. I say * material, for it is impossible to be sure how far the judgment of the gentlemen who executed the deed may have been influenced by the fact of particular persons being named as directors.

It is impossible, therefore, in my opinion, under the peculiar jurisdiction created by the Winding-up Acts, to enforce this deed against those to whom the representations were made at the instance of those by whom they were made.

In an ordinary litigation the Court might decline to attend to such a defence, unless some substantive proceeding were taken to impeach the deed; but, under this peculiar jurisdiction, I think

that such a step is not necessary, and that it would not be proper to require it to be taken. Upon the evidence before us it appears that one body of persons was induced to enter into a contract, involving certain liabilities, upon a representation of facts made by another body, which representation of facts was untrue, and was at the time known to be untrue by those who made it. I say this without any intention of imputing dishonest views to those who made it; they may not have meant ill, but the representation was, I repeat, untrue: they knew it to be so, and they cannot therefore derive any benefit from a liability contracted on the faith of that representation.

As between these parties, I am of opinion that no liability in respect of debts or costs attaches on the members of the second class until that of the members of the first class, or those of them to whom the representations can be traced, shall have been exhausted.

As to the observations made by *Mr. Mackeson* and *Mr. Stevens*, to the effect that their clients were not privy * to * 51 any misrepresentation, I do not attribute the representation to each individual in the class, but some of the individuals in the class must be charged with it. I say nothing as to the point relating to the forty shares, it not being necessary for the present purpose to give any opinion upon it. Matters cannot remain as they are. I have felt great doubt whether the calls ought to be discharged *in toto*, or as to the second class only, without prejudice to any application by any member of the first class to discharge them, as between himself and other members of that class. My learned brother thinks that the former course is the more safe and correct one, and I accede to this view, though at first I was inclined the other way. The order will be to discharge the calls, and it will be desirable to preface it by a statement of the grounds on which we consider that they ought to be discharged.

THE LORD JUSTICE TURNER. — When this matter was last before the Court, we were pressed to decide the rights of the parties, so as to furnish a guide to the Master in making calls. We regretted that the facts of the case were not then sufficiently before us to enable us to do so, but we now have before us facts enabling us to decide who are the parties primarily liable.

The motion before the Court has three objects: first, to strike

out the names of the parties moving from the list of contributories; secondly, to discharge the call for debts; and, thirdly, to discharge the call for costs. As to the first point I shall say nothing, as the parties moving do not press for any decision on it if relief be given them on the other two points.

* 52 * As to the call for debts, the question turns solely on the deed, which contains a covenant by the parties who executed it of the first part to indemnify the managing directors against all liabilities; but these managing directors are described on the face of the deed as being themselves some of the parties thereto of the first part. The contract, therefore, was a contract by the managing directors and the subscribers to indemnify the managing directors.

Lord Justice KNIGHT BRUCE has gone so thoroughly into the question as to the representation made by the deed, that I have nothing to add on that head; but there is also another point of view in which the matter may be looked at. The covenant of indemnity was intended to be entered into by all parties, and it was entered into by the subscribers on the faith of its being entered into by the managing directors also. But as no managing director executed it, the parties who intended to be bound jointly with others were left bound alone, and I consider that in such a case they have a right in equity to insist that they are not bound at all.¹ In *Underhill v. Horwood*, (a) Lord ELDON said: "I had a notion, which I think was not correct, that, where a man executes a bond, meaning that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. But the cases go further. In such a case, however, unless there is something special, the man who had become so severally bound has a right to have that bond delivered up; for his intention was, not to become a mere several obligee, but to be a joint and several obligee; and the rights are different both in law and equity; for if he is only a several obligee, he has no remedies over
* 53 against any one; but, if he is a joint * and several obligee, or only a joint obligee, there is a right of contribution against the other sureties in equity, from the earliest times, and of exoneration from the principal."

On this principle I think that, as none of the managing directors

(a) 10 Ves. 225.

¹ See *Cutter v. Whittemore*, 10 Mass. 442.

executed this deed, there arose an equity on the part of the subscribers, to have it delivered up to be cancelled ; or, at all events, to insist that it should not be enforced against them. Now the 83d section of the Act 11 & 12 Vict. c. 45, provides that calls are to be made against the contributories ; “ but so far only as such contributories respectively shall be liable at law or in equity to pay the same.” The call for debts, therefore, which proceeded on the footing of a liability created by this deed, cannot be sustained as against the contributories in class No. 2.

It is true that the costs of winding up are not within the scope of the deed ; but does the Act of Parliament make any distinction between the liability to debts and the liability to costs ? The Act says, that calls shall be made, “ as well for raising such amount as may be necessary to pay the debts or liabilities, or any of the debts or liabilities of such company, or any part thereof, or the costs, charges, and expenses of winding up the same, as also for the purpose of adjusting and settling the respective claims of contributories upon each other, or upon the company.” There is here no indication of an intention to make any distinction between the liability to debts and the liability to costs.

The deed does not regulate this matter, so it is necessary to look to principle. What is the principle in a suit for contribution ? That must determine it ; the object of the Act being to work out contribution without * the expense of a suit. I consider * 54 that where parties not entitled to contribution come to the Court to obtain it, they cannot throw upon the other parties any part of the costs. The case of *Mowatt v. Elliott (a)* closely resembles the present, and the same principle applies to both. I think that in the present case the first class of contributories have no right to throw any part of the costs upon the second class.

As to the form of the order to be made, I think that the calls should be wholly discharged, and for this reason : the object of the Master in making them appeared to be to raise funds sufficient to pay at once all the debts and costs, which purpose would not be answered if the calls are partially discharged. The best way, therefore, will be to discharge the calls wholly, prefacing the order with a declaration as to the rights of the parties : and the declaration will, in substance, be a declaration that resort ought not to be had to the parties of the second class for debts or costs until resort

(a) 3 De G., M. & G. 254 [and cases cited in notes].

has been had to the parties of the first class, or some of them ; this to be without prejudice to any question as between the parties of the first class *inter se*.

1855. February 13, 14, 16. Before the LORDS JUSTICES.

Bequest of "all my moneys," *held*, to include two balances standing to the credit of the testator at his bankers, — one upon an ordinary current account, the other secured by deposit notes bearing interest.¹

Secus, as to a sum of money returned to the testator's personal representative by stakeholders with whom the testator had placed it to abide the result of a wager which remained undecided at his death.

Moneys which had been deposited with the testator to abide the result of bets between himself and the depositors were, after his death, returned to the depositors by his administratrix, who, at the same time, paid the amount of such of the bets as were not still pending at the testator's death, but had been decided against him in his lifetime: *Held*, that in respect of the deposits so returned upon bets not decided in the testator's lifetime, the administratrix was entitled to credit in her accounts against the general estate; but not so in respect of the sums paid for bets decided before the testator's death and for the deposits upon such bets.

The testator died in the occupation of a furnished tavern where he carried on the business of hotel-keeper and betting agent, sleeping there occasionally for the convenience of his business, but having his ordinary residence at another house: *Held*, that such parts only of the tavern furniture as were for the testator's own domestic or personal use passed under a bequest of "all my household furniture" contained in his will.²

In construing a will of personal estate, the Court, notwithstanding an objection by counsel that the probate copy alone could be looked at, ordered the original will to be produced, and had regard to certain erasures appearing therein, but which had been omitted in the probate.³

THIS was an appeal from the decision of Vice-Chancellor STUART, upon the construction of the will of Edward Stephen Manning deceased.

¹ See 1 Jarman Wills (3d Eng. ed.), 730, n. (k), 731-736 (4th Am. ed.) 603 in note, 612 notes; Mann v. Mann, 1 John. Ch. 231; Morton v. Perry, 1 Met. 446; Stratton v. Hillas, 2 Dru. & War. 51.

² See 1 Jarman Wills (3d Eng. ed.), 721 and n. (b).

³ See 1 Jarman Wills (3d Eng. ed.), 23, 24.

The hearing before the Vice-Chancellor is reported in the second volume of Messrs. Smale and Giffard's Reports. (a)

The will was written by the testator, filling up in his own handwriting one of the common printed forms sold in the shops. The original will, which had not been produced before the Vice-Chancellor, was (notwithstanding an objection by counsel for the respondents, that the probate alone could be looked at) sent for by their Lordships' order. The material part was as follows: (The portions printed in ordinary type represent the lithographed form; those printed in italics * represent the parts written by * 56 the testator, and the portions enclosed in brackets represent parts of the lithographed form which were struck out by the testator.)

"This is the last will and testament of me, *Edward Stephen Manning, of Upper Edmund Street, King's Cross, Middlesex, London.* I direct that all my just debts and funeral and testamentary expenses be paid [and satisfied by my executors hereinafter named], as soon as conveniently may be after my decease. I give, devise, and bequeath *unto my wife Elizabeth Manning all my moneys, household furniture, plate, books, linen, wearing apparel, &c., &c.*

And [as to] all the [rest] residue and remainder of my estate and effects whatsoever and wheresoever, both real and personal, whether in possession or reversion, remainder or expectancy, I give, devise, and bequeath the same unto [and , their heirs, executors, administrators, and assigns, upon trust to convert the same into money, and to invest the money arising from such conversion in, &c., and to pay the income thereof unto] my dear wife during the term of her natural life; and from and after her decease I give, devise, and bequeath the same, and every part thereof, unto and among (*if any*) *of my* , and to be equally divided between [all and every my] children, who shall be living at the time of the decease of my wife, and the issue of such as shall be dead, to and for their own use and benefit absolutely."

The testator had struck out the clause in the lithographed form

for the appointment of executors, and letters of administration, with the will annexed, were granted to his widow.

* 57 * At the date of his death, the testator had his private residence in Frederick Street, Gray's Inn Road, and he was landlord of the Crown Tavern, in Clifford's Inn Passage, where he carried on the business of hotel-keeper, and also kept a betting-office.

As keeper of the betting-office, the testator took and gave the odds against horses, entered for particular races, and, on these occasions, received deposits from the persons making the bets, giving them tickets which entitled them, in the event of their being winners, to the return of such deposits, together with payment to them of the amount payable in respect of the bets.

According to the custom or practice adopted in betting on horse-races, the death of either party before the race vacates the bet. At the time of the testator's death, many persons held tickets given by him to secure deposits for bets that had been made by them, upon the terms above mentioned. Some of the bets so secured, having been determined against the testator, were then actually payable. These the administratrix had paid, returning at the same time the corresponding deposits, and the tickets securing them had been given up to her to be cancelled. The residue of such bets were still pending at the testator's death, the events upon which they depended not having then happened. The administratrix had returned the deposits upon these and the corresponding tickets had been delivered up to her to be cancelled. The aggregate of the bets and deposits so paid and returned by her amounted to 2249*l.* 11*s.* 2*d.*

The testator had also, shortly before his death, deposited in the hands of two persons, named respectively Dowling and Chapman, as stakeholders, the sum of 6000*l.*, to answer a bet of six to

* 58 one upon a race, 1000*l.* * having been deposited on the other side. Upon the death of the testator before the bet could be determined, the stakeholders, considering the bet to have failed, returned the 6000*l.* to the widow, as administratrix of the testator.

It appeared, also, that the testator, at his death, had standing to his credit, at the London and Westminster Bank, 2049*l.* 19*s.*, upon an ordinary current account as between banker and customer. He had also standing there to his credit a sum of 5811*l.*

19s. 7d. upon a deposit account, which, by the custom of the bank with respect to such account, was payable upon the indorsement and delivery up by the depositor, or person claiming under him, of the receipt given by the bank for such deposit when made.

The questions upon the appeal were: first, whether, upon the construction of the will, the property comprised in the enumeration of particulars contained in the first clause, passed by way of specific bequest to the testator's wife absolutely, or whether the whole of the testator's property was given in one mass for the benefit of his wife for life, and after her decease for her children. Secondly, if the wife took an absolute specific bequest, what was the extent of her interest thereunder, with reference to the property comprised therein; and, thirdly, whether the sum of 2249l. 11s. 2d., paid by the administratrix of the testator, in respect of bets owing by him and deposits for bets in his hands at the time of his death, or what part thereof, could be allowed her in account with the general estate of the testator.

Mr. Bacon, Mr. Renshaw, and Mr. Needham, in support of the appeal. — Upon the construction of this will it is submitted, that no part of the testator's estate is given to his widow * absolutely, but that the whole is bequeathed to her for life * 59 only, with remainder for the benefit of her children. The erasure by the testator from the printed form, of the words "as to," between the enumeration of particulars and the disposition of the residue is decisive, as showing an intention to make one gift of the whole of his property. But if it should be held that this is not so, and that there is a specific bequest by the will to the widow absolutely of every thing comprised in the terms, "all my moneys, household furniture, plate, linen, books, wearing apparel, &c., &c.;" then we contend that the 6000l., deposited with Messrs. Dowling and Chapman by the testator, is not described by, or comprised in, those terms. The only term in the clause which can be regarded as applicable to it is "moneys," but in no sense can it be said to have formed part of his "moneys" at his death; for, from the moment the deposit was made, the 6000l., though recoverable by the testator (if *Varney v. Hickman* (a) is to be regarded as law), was never in his possession or power.

(a) 5 C. B. 271; 5 Dowl. & L. 364.

Secondly. Neither does the balance standing to the testator's credit on the deposit account with his bankers, pass under the description of "moneys;" for this was not a fund immediately available by the testator. It was subject to a contract between him and the bank, that it should not be payable, except upon presentation of the deposit receipt indorsed by the testator. It was not in fact money belonging to the testator, but a debt owing by the bank, and secured by the deposit note. *May v. Grave*, (a) *Barry v. Harding*, (b) *Fryer v. Ranken*, (c) *Beales v. Crisford*, (d) *Smith v. Butler*, (e) *Stephenson v. Dowson*, (g) *Gosden v. Dotterill*. (h)

* 60 * Thirdly. The balance at the bankers upon the ordinary current account did not pass, as in *Parker v. Marchant*; (i) for it was not placed there by the testator for his own private purposes, but for the purpose only of his business as betting agent.

Fourthly. The furniture at the tavern in Clifford's Inn Passage did not pass. It was possessed and used by the testator merely for the purposes of his business of hotel-keeper; and upon this *Le Farrant v. Spencer* (k) and *Pratt v. Jackson* (l) are decisive.

Lastly, as to the payments made by the administratrix in respect of bets and deposits with the testator, it is clear, that these sums could not have been recovered from him in his lifetime. Any suit for such a purpose is expressly forbidden by the Statute 8 & 9 Vict. c. 109, by the 18th section of which it is enacted, "that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

These payments, therefore, can only be regarded as voluntary,

(a) 3 De G. & Sm. 462.

(c) 3 Jo. & Lat. 565.

(b) 1 Jo. & Lat. 475.

(g) 3 Beav. 342.

(c) 11 Sim. 55.

(h) 1 Myl. & K. 56.

(d) 13 Sim. 592.

(i) 1 Y. & C. C. C. 290; S. C., on App. 1 Phil. 356.

(k) 1 Ves. 97.

(l) 2 P. W. 302; S. C. on App. 1 Bro. P. C. 222.

and ought not to be allowed as against the general estate. If, however, *Varney v. Hickman* (a) is to be considered as binding, then we submit, that those payments only which were made in returning deposits * upon bets not decided at the testator's * 61 decease, are to be allowed.

THE LORD JUSTICE KNIGHT BRUCE. — Upon the first question, the counsel for the respondents need not trouble themselves to address the Court, as Lord Justice TURNER (who is suffering from a cold) has requested me to state that he agrees with the Vice-Chancellor in thinking, that whatever is comprised in the words "all my moneys, household furniture, plate, books, linen, wearing apparel, &c., &c.," is given by the will to the testator's wife absolutely. That construction appears to him more consistent with grammar and idiom than that suggested for the appellant. It appears to him, that it could not have been the intention of the testator, that the salable property within these words should be sold as against the wife; whereas the probable effect of otherwise construing the will would be, that the whole would have to be sold. He is also struck with the expression following the words, wearing apparel, "&c. &c.," as strengthening the same view, and he considers it scarcely possible to conceive the testator to have intended her to take a life-interest in wearing apparel, which is among the articles specifically mentioned. He is of opinion, that the Vice-Chancellor's interpretation of the will is in this respect correct, thinking that a sufficiently strong inference to the contrary is not to be drawn from the erasure of the words "as to," especially when compared with other erasures. For myself, I entertain more doubt considerably, but not a doubt amounting to dissent. It is impossible for a Judge of appeal properly to dissent for any practical purpose from the decision under review, unless he is satisfied that his view is the more correct one. My view, however, is not material, inasmuch as the opinion of Lord Justice * TURNER, agreeing with the decision of the Vice-Chancellor * 62 upon this question, has the effect of confirming that decision. I only doubt. The order of the Vice-Chancellor, therefore, must stand as to the construction put by him upon the will, with reference to the extent of the widow's interest in the subjects of this bequest, whatever they are. What they are remains to be argued.

Mr. Elmsley and Mr. Charles Hall, for the respondents. — By the custom of the betting world, the wager upon which the 6000*l.* was deposited with Messrs. Dowling and Chapman was vacated upon the death of the testator before the happening of the event on which it was made, and from that moment the money ceased to be a deposit abiding the event of a wager, but became part of the assets of the testator, and passed under the bequest of “all his moneys.” The prohibition of the 8 & 9 Vict. c. 109, § 18, is directed against the recovery by the winner from the stakeholder of the other party’s deposit, and not against the recovery back by the depositor of his own deposit. *Varney v. Hickman*. (a) The old law in this last respect, as acted upon in *Jacques v. Withy*, (b) was not intended to be altered.

As to the balances at the testator’s bankers, that upon the ordinary account (whether kept for trade purposes or not) passed under the word moneys: *Parker v. Marchant*; (c) so, likewise, the balance on deposit, which was payable at sight upon the note. *Vaisey v. Reynolds*, (d) *Fryer v. Ranken*, (e) *Smith v. Butler*. (g)

* 63 * With regard to the tavern furniture, the case is distinguishable from *Pratt v. Jackson*, (h) and *Le Farrant v. Spencer*, (i) inasmuch as the testator resided at times at the tavern, and the furniture was not used by him wholly for trade purposes. Upon our view of the Statute 8 & 9 Vict. c. 109, § 18, the payments made by the administratrix in respect of deposits upon the bets were all proper, and ought to be allowed her in account. As to the payments in respect of bets left undecided at the testator’s death, *Varney v. Hickman* is an authority in our favour. [They also referred to *Lowe v. Thomas*. (k)]

Mr. Bacon, in reply.

February 16.

THE LORD JUSTICE KNIGHT BRUCE. — The first question is whether or how far the administratrix is entitled to be allowed, as

(a) 5 C. B. 271.

(b) 1 H. Bl. 65; 1 T. R. 557.

(c) 1 Y. & C. C. C. 290, and 2 Id. 279; 1 Phil. 356.

(d) 5 Russ. 12.

(h) 2 P. W. 302.

(e) 11 Sim. 55.

(i) 1 Ves. 97.

(g) 3 Jo. & Lat. 565.

(k) Kay, 369.

against the general estate, the sums paid in respect of deposits on bets in the hands of the testator at the time of his death. As to bets not decided in his lifetime, we are of opinion, that those payments ought to be allowed as against the general estate; but, as to the payments in respect of bets decided in the testator's lifetime, there appears to us neither justification, nor what in this Court can be considered as an excuse, for making the payments; however proper, and in a sense laudable on the part of the lady, the feeling under which they may have been made. Unless, therefore, the parties have the good sense to make a division of these payments, they must form the subject of further investigation.

The next question is, as to the particulars included * under * 64 the terms, "all my moneys, household furniture, plate, books, linen, wearing apparel, &c., &c." I think that such goods in the tavern or house in Clifford's Inn Passage, where the tavern business was carried on, such goods in that house as belonged merely to the business, and were designed for the purposes of the business, ought not to be considered as passing under that description. Proceeding, not only on the rules of good sense and on principle, but on the decision also of Lord HARDWICKE, in *Le Farrant v. Spencer*, and on other decisions which might be referred to, I think it not impossible that there were some things in the house in Clifford's Inn Passage that did pass under the description mentioned. I am of opinion, therefore, that, unless the parties can arrange the matter, there must be an inquiry as to these particulars in terms analogous to those used in the case of *Le Farrant v. Spencer*. (a)

(a) The decree in *Le Farrant v. Spencer*, so far as it relates to the specific bequests, is as follows:—

"And as to the specific bequest of all the said testator's household goods, furniture, jewels, plate, books, linen and apparel to Mary, now the wife of the defendant Adam Spencer, it is ordered, that the said Master do inquire what of those particulars the said testator was possessed of at the time of his death, either for his own domestic or personal use, or in the way of trade, or as merchandise; and the said Master is to distinguish and ascertain the same; and his Lordship declared that such parts thereof as the said Master shall find were for the said testator's own domestic or personal use, do pass by the said bequest to the said defendant Mary, the wife of the defendant A. Spencer; and it is further ordered that the same be delivered to the plaintiffs * Adam Spencer and Mary his wife. And his Lordship did declare that the rest of the said particulars do belong to the residuary part of the said testator's personal estate." (Reg. Lib. B. 1747, fol. 68, G. E.)

* Sic in Reg. Lib.

With regard to the balance standing to the testator's credit at his bankers, which did not bear interest, that balance as well * 65 as the money in his house at the time of * his death must unquestionably be considered as passing under the term "moneys." I have some doubt as to the other portion of the balance at his bankers, inasmuch as it could not be dealt with by ordinary checks, but would have required some notice: my doubt, however, is not so strong as to justify me in dissenting from what the Vice-Chancellor has decided in this respect. It is only a doubt, and I cannot act against his judgment upon a doubt.

The only remaining question is that relating to the 6000*l.* deposited with Messrs. Dowling and Chapman. That, I think, does not pass under the words of the specific bequest. It was money which, after it had been paid by the testator to the stakeholders, was not, in any sense, in his possession or power at any subsequent moment of his existence, subject to this remark, that, on the assumption of the correctness of the decision in *Varney v. Hickman*, he might, if he had elected to withdraw from the bet, have been entitled to recover it. I assume that he would so have been entitled to recover it; he, however, did not withdraw from the bet. Not only was it uncertain whether he would withdraw, but highly improbable that he ever intended to withdraw. Not at any moment of his life, therefore, after making the deposit, was this sum of 6000*l.* "his moneys" in any sense; though since his death it has become part of his assets.

THE LORD JUSTICE TURNER.—Two questions have arisen in this case, — one of construction, whether upon the terms of the will, there is a specific bequest to the testator's widow, the other what, if there is such a bequest, is the extent of it? As to the first of these questions, I will only add to the observations which * 66 have been already made this remark with * reference to the erasure of the words "as to," namely, that there are other words also struck out by the testator from the printed form in a way which shows that no reliance can be placed upon the erasures as having been deliberately and advisedly made with a view to alter the construction to be put upon the will. In coming to a conclusion upon this question, I have not overlooked the effect to be given to the erasures as they appear on the original will. The result, therefore, being that there is a specific bequest to the widow

of "all my moneys, household furniture, plate, books, linen, wearing apparel, &c., &c.," the question arises, — what is comprised in that bequest? But first, as to the claim against the estate in respect of the application by the administratrix of the sum of 2249*l.* 1*l.* 2*d.* in payment of bets owing, and in the return of deposits for bets held, by the testator at his death. This sum was made up of two classes of payments: first, payments in respect of bets and deposits upon bets decided in the testator's lifetime: secondly, payments in respect of deposits upon bets pending at his decease. I am of opinion, as to the payments of the first class, that, having regard to the provisions of the statute, they could not have been recovered from the testator in his lifetime, and that, therefore, the payments by the administratrix in respect of these can be regarded only as voluntary payments, and not valid as against the estate. But, with regard to the payments in respect of bets left undecided at the testator's death, I think the case stands very differently. The deposits upon them had been received, indeed, by the testator upon an illegal contract, but it was, I think, within the powers of the administratrix to determine such illegal contract, and I take it, that in making these payments she must be considered as having done so, and that these payments must therefore be allowed against the estate.

* Then as to the extent of the specific bequest, it appears, * 67 in the first place, that the testator had made a bet of 6000*l.* to 1000*l.* upon a race which remained undetermined at his death. He had deposited the money against the 1000*l.* staked by his opponent, both sums having been placed in the hands of two gentlemen as stakeholders, and by them placed to a deposit account at their bankers. This sum, therefore, never having been, from the time of making such deposit up to the moment of the testator's death, in his hands or power cannot be regarded as his money at the time of his death; and if not, it cannot be held to pass under the words "all my moneys."

The next question is, as to the general balance standing to the testator's credit on a general current account at his bankers. I think this must be considered as the testator's moneys at his death. Looking at the ordinary language and usage of mankind, when a man says, "I have so much money at my bankers," he considers and treats it as his money; and when he speaks of all his money, he includes the balance at his bankers. No doubt it is properly

only a debt due from the bankers, but the ordinary usage of mankind treats it as money.

There is then this further question. There was at the testator's death a sum standing to his credit upon a deposit account with his bankers, for which he had taken a deposit note bearing interest. Upon this I have felt considerable doubt; but I think that that also must be considered as "moneys" of the testator, within the meaning of the will. The substance of the case is, that the testator had two distinct accounts at his bankers, the one a current account, and the other an account which he treated as a reserve fund, but which was not, therefore, the less his moneys.

* 68 * The only remaining question is, as to the furniture at the tavern in Clifford's Inn Passage. Upon this, I think, the decree of Lord *Hardwicke*, in *Le Farrant v. Spencer*, is decisive, as establishing that, under the words "household furniture," only such part of the tavern furniture passes as was reserved by the testator for his domestic or personal use. As to this, therefore, unless the parties can agree, an inquiry must be directed.

An order carrying into effect the declarations contained in their Lordships' judgments, but obviating the necessity of further inquiries, was then arranged and taken.

EWART *v.* WILLIAMS.

WILLIAMS *v.* EWART.

1855. February 27 and March 1 and 22. Before the LORDS JUSTICES.

Held, confirming the decision of Vice-Chancellor KINDERSLEY, *dissentiente* Lord Justice KNIGHT BRUCE, that the 15 & 16 Vict. c. 86, § 54, is retrospective in its operation, and that it empowered the Court to give special directions as to the mode of taking an account, including directions as to books of account being taken as *primâ facie* evidence, in a case in which the account, though not yet taken, had been directed by a decree pronounced several years before the passing of the Act.¹

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1231, n. (5). The provisions of the Act only apply to the mode of taking or vouching an account, and do not authorize any substantial variation of a decree which has been previously made;

Held, also, that the statute ought not to be called in aid till all means of proving the account by independent evidence had been exhausted.¹

THIS was a motion to discharge an order of Vice-Chancellor KINDERSLEY, whereby, in exercise of the power given to the Court of Chancery by the Act 15 & 16 Vict. c. 86, § 54, he had directed that the books of account of Messrs. Ewart & Bell (the plaintiffs in the original suit and the defendants in the cross suit) might be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to John Williams (the defendant in the original suit and the plaintiff in the cross suit) to take such objections thereto as he might be advised.

* Messrs. Ewart & Bell, who were stockbrokers, were employed in 1842, and subsequently by Mr. Williams to buy and sell on his account, foreign stock and shares, in various railway and other companies. The object of the original suit was to obtain an account of these transactions from the defendant, Williams, who, on the other hand, instituted the cross suit, alleging fraud on the part of Messrs. Ewart & Bell, with reference to some of the transactions in question, and praying that certain securities held by them might on that ground be ordered to be delivered up to him, and, if the Court should be of opinion that there had been no fraud committed, then for an account. * 69

From the evidence in the cause it appeared to be the custom of stockbrokers, in conducting their business, to go in person upon change, and execute the orders of their customers by effecting the requisite purchases or sales with the jobbers, and on their return to their office to communicate the particulars of the business thus transacted to their clerk, who then entered such particulars in books kept for the purpose.

and, therefore, do not empower the Court to add a direction to make annual rests, to the ordinary decree against a mortgagee in possession. *Nelson v. Booth*, 3 De G. & J. 119; 5 Jur. N. S. 28; see *Ogden v. Battams*, 1 Jur. N. S. 791, V. C. W.; *Sleight v. Lawson*, 3 K. & J. 392; *Banks v. Cartwright*, W. N. (1867) 27; 15 W. R. 417, M. R.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1231, n. (5); *Morgan v. Higgins*, 1 Giff. 270, 283; 5 Jur. N. S. 236, 240; and see *Coleman v. Mellersh*, 2 M'N. & G. 309 and notes. Special directions as to the manner of taking accounts, and receiving books of account as *prima facie* evidence, should not, in general, be given at the hearing; but by the Judge in the course of the proceedings in Chambers. Attorney-General v. Attwood, 9 Hare, App. 56, n.; 2 Dan. Ch. Pr. (4th Am. ed.) 1231 in note (5).

The issue raised by Williams, both in the original and in the cross suit, was that some of the entries thus made, having relation to the business, alleged to have been done for him, were fictitious, and that no real transactions corresponding to them had ever been effected by Messrs. Ewart & Bell on his behalf.

The clerk employed by Messrs. Ewart & Bell, throughout the period of their dealings with Williams, died before the hearing of the cause, without having been examined as to the entries in question, and Williams, it appeared, had not examined either of the plaintiffs or obtained any other evidence in support of his defence.

* 70 * On the 7th July, 1845, a decree was made in both causes, declaring the plaintiffs to be entitled to the benefit of the securities in the pleadings mentioned, and directing a reference to take an account of the dealings and transactions between the parties to the litigation.

For the purposes of the account to be taken under this decree, Messrs. Ewart & Bell, in November, 1854, applied (upon notice served originally in March, 1854) to the Vice-Chancellor for the order appealed from, which was pronounced upon a renewal of the motion on the 7th December, 1854, evidence having in the interval been procured for the satisfaction of the Court, showing the reality of many of the transactions, the entries of which were alleged by Williams to have been fictitious.

The hearing of the original motion before the Vice-Chancellor is reported in the third volume of Mr. Drewry's Reports. (a)

Mr. Cairns, in support of the appeal motion. — There are two grounds of objection to the order appealed from: first, the 54th section of the Act of Parliament (b) does not apply to an ac-

(a) Page 21.

(b) 15 & 16 Vict. c. 86, § 54. "It shall be lawful for the Court, in any case where any account is required to be taken, to give such special directions, if any, as it may think fit, with respect to the mode in which the account should be taken or vouched, and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the Court that the circumstances of the case are such as to require such special directions; and particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct, that in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth

count directed to be * taken in 1845, long before the Act * 71 passed; and, secondly, the entries which are sought to be made *primâ facie* evidence, are the very entries, the propriety or genuineness of which constitutes the issue in the litigation.

As to the first objection, your Lordships, in *Lodge v. Pritchard*, (a) expressed a doubt whether this section of the Act operates retrospectively. We submit that that doubt is well founded. The case has been framed and a decree obtained on the footing of the law as it stood at the time it was pronounced. Mr. Williams, if aware that these books might be made evidence, might have then adduced testimony now no longer available. The books, though impeachable ten years ago, may now no longer be so. The order which we seek to discharge has the effect of varying the decree, and of giving practically to the plaintiffs the benefit of a stated and settled account. As all the knowledge of the items is on the side of the plaintiffs, the Court will not, without the most cogent reasons, construe the Act so as to give it an *ex post facto* operation, entirely changing the position of the parties during the suit, at a period when they can no longer shape their case differently. The word used in the Act is future,—"shall." To construe it as retrospective would have an effect most oppressive.

Mr. Bagshawe and *Mr. Rasch*, for the plaintiffs, Messrs. Ewart & Bell, were called upon only as to the retrospective operation of the statute.— We submit that the section is meant to apply to the time when the account comes to be taken, whether in a suit pending or otherwise, the futurity expressed by "shall" applying to that only, and not to the time of the * institution of * 72 the suit or of the decree therein. On comparing section 29 of the Act and the 39th Order of August 7, 1852, an irresistible inference arises that the Act was meant to apply to suits then pending. Special directions as to the mode of taking the accounts were not unusual before the Act passed. *Millar v. Craig*, (b) *Allfrey v. Allfrey*. (c) And the Act, upon the construction of

of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

(a) 3 De G., M. & G. 906 [and cases in notes].

(b) 6 Beav. 433.

(c) 10 Beav. 353.

several of its clauses, has been decided to have a retrospective operation. *Martin v. Hadlow*, (a) *Campbell v. Moxhay*. (b)

The entries in these books are such as may be received as evidence, according to the general principles of evidence. *Doe d. Pattershall v. Turford*, (c) *Marks v. Lahee*, (d) *Champneys v. Peck*, (e) *Pitman v. Maddox*, (g) *Smartle v. Williams*, (h) *Pritt v. Fairclough*, (i) *Digby v. Stedman*, (k) *Poole v. Dicus*, (l) *Price v. Lord Torrington*, (m) *Furness v. Cope*. (n)

Mr. Cairns, in reply. — Though there are several clauses of the Act which have been held retrospective, that construction does not apply to all. Each section must be construed upon consideration of its own language and idiom, and the consequences which would follow from the particular construction contemplated. Here the consequence of the construction contended for by the plaintiffs would be to alter the general principle of evidence, that a man's entries in his own shop books cannot, without more, be used in his own favour against other parties.

The argument on the merits was then proceeded with. It turned on the questions as to the genuineness of the entries being the point at issue in the suit, the impossibility of obtaining proof as to the entries, and the delay in the prosecution of the suit.

March 22.

THE LORD JUSTICE TURNER. — This was a motion to discharge an order of Vice-Chancellor KINDERSLEY, directing certain books of account of Messrs. Ewart & Bell, the plaintiffs in the original suit, and the defendants in the cross suit, and in which books the accounts directed by the decree in these suits are alleged to have been kept, to be taken as *prima facie* evidence of the truth of the matters therein contained; with liberty to John Williams, the defendant in the original suit and plaintiff in the cross suit, to

(a) 9 Hare, App. 52.

(d) 3 Bing. N. C. 408.

(b) 18 Jur. 641.

(e) 1 Stark. 404.

(c) 3 Barn. & Ad. 890.

(g) 2 Salk. 690; Lord Raym. 732; S. C., B. N. P. 282.

(h) B. N. P. 283.

(l) 1 Bing. N. C. 649.

(i) 3 Camp. 305.

(m) 1 Salk. 285; 2 Ld. Raym. 873.

(k) 1 Esp. 328.

(n) 1 Bing. 114.

take such objections thereto as he may be advised. The accounts directed by the decree, are accounts of all dealings and transactions between Messrs. Ewart & Bell, who are stockbrokers, and Mr. Williams, one of their customers, and the decree directing these accounts bears date the 7th of July, 1845, long anterior, therefore, to the passing of the Statute 15 & 16 Vict. c. 86, under the provisions of which this order was made. I treat the order as made under the provisions of the statute, because (whatever length this Court has gone to as to the evidence to be adduced in matters of account, — and it has certainly, particularly of late years, gone to great lengths in that respect, — although, I believe, rather in trust accounts and in accounts falling exclusively within the cognizance of a Court of Equity than in accounts which might be * dealt with at law also), I take it to be quite clear that, * 74 independently of the provisions of the statute, this order cannot be maintained. In the absence of the statutory provision, it would be contrary to all precedent and practice for such an order to be made upon motion pending the account in the Master's office. The first objection made to the order was, that the provisions of the statute on which the order is founded do not extend to cases in which, as in the present case, the decree directing the accounts was made before the statute was passed; but, looking at the evil which this provision of the statute was intended to meet, the difficulty, if not impossibility, in many cases of an account being justly taken between the litigant parties without special directions being given as to the mode in which it should be taken, and looking to the language of the section in which the provision is contained, — the 54th section, which is general where an account is required to be taken, and which gives power to the Court to act either by its decree or by any subsequent order or orders; and more especially, looking to the wide and unqualified discretion which is given to the Court as to applying the provision, I think (although upon this point it must be distinctly understood I state my own opinion only), that, where an account directed by a decree made before the passing of the statute has not been taken, it is in the power of the Court, under the provisions of the 54th section, to give special directions as to the mode in which it should be taken, including, of course, directions as to books of account being taken as *primâ facie* evidence. My opinion upon this point agrees with that of

the Vice-Chancellor ; but I think that this provision of the statute is one which is to be applied with the utmost possible circumspection, and that, in applying it, regard ought to be had both to the period when the decree was made, and to the nature of the account directed. It is a provision which empowers this Court to * 75 alter the rules * of law, and those rules ought not to be departed from, except in cases in which the justice of the case renders it necessary to depart from them. If the means exist of proving the items of the account by independent evidence, I think those means should be applied before the provisions of the statute are called in aid. Independently of other considerations, the mere fact of some of the items being proved by independent evidence, would give weight and character to the books. With these views, I have looked into the affidavits which were filed upon this motion, and upon examining them, I am by no means satisfied that it is beyond the power of Messrs. Ewart & Bell to give sufficient legal evidence as to some of the transactions in question. As to others of them, it may be beyond their power to do so, and to that extent it may ultimately be right, although I give no opinion upon that point, to apply the provisions of the statute. But, under the circumstances of the case, as it stands at present, I think the order complained of goes too far, and must therefore be discharged without prejudice, and that the proper order to have been made was to direct the motion to stand over until the hearing of the causes for further directions. To this order my learned brother is willing to agree, but the reasons which I have assigned for making it are to be attributed exclusively to me.

THE LORD JUSTICE KNIGHT BRUCE. — The order appealed from appears to me, unless authorized by the statute of 1852, to be beyond the power of the Court and incapable of being supported ; and on the ground that the decree which directed the accounts in question — accounts not yet taken — was made in 1845, and therefore before the passing of the statute, I doubt very much whether the order is authorized by the statute ; but, assuming it to be so, I doubt the sufficiency of the * circumstances of the case to support the order, especially as the notice of motion upon which it was made, having been given not before a day in March, 1854, was not given until more than sixteen months

after the statute had come into operation, and more than eight years after the decree. I am willing, however, to concur in the order that my learned brother has proposed, reserving myself as to the course to be taken if the matter shall be brought hither again.

WALTHAM v. GOODYEAR.

1855. March 3. Before the LORDS JUSTICES.

Order made under the Duchy of Lancaster Court of Appeal Act (17 & 18 Vict. c. 82), authorizing service of a claim on a defendant residing out of the jurisdiction of the Duchy Court.

THIS was an application made *ex parte* for an order under the 17 & 18 Vict. c. 82, the Act establishing a Court of Appeal in Chancery for the Duchy of Lancaster.

The Act provides (§ 8), that "in all cases in which any person who may be a necessary or proper party to any suit or other matter in the Court of Chancery of the said county palatine shall not be subject to the jurisdiction of the said Court, it shall be lawful for the Court of appeal, on the application of the plaintiff in such suit, or of any person to whom the conduct of such suit may have been committed, or of the party proceeding in such other matter, if that Court shall think fit, and according as it shall appear to that Court best calculated to answer the ends of justice, either to order and direct that the said suit or other matter be transferred to the High Court of Chancery, or otherwise to order and direct that such service as may be proper be effected upon such person out of the jurisdiction of the said Court of the said county palatine, and such application shall be made either *ex parte* or upon such notice as the said Court of * appeal shall * 77 think fit: provided, nevertheless, that if such order for service shall have been made without notice to any person affected thereby, it shall be lawful for the Court of appeal, upon the subsequent application of any such person, to make such order for transferring the said suit or other matter to the High Court of Chancery, or otherwise as to the said Court of appeal shall seem just."

The Act also provides (§ 5), that "the Court of appeal shall

make such regulations as may from time to time be necessary for fixing and regulating the sittings and business of the Court; and the registrar and other officers who, according to the existing practice, are attendant upon the Chancellor of the said duchy and county palatine in matters of appeal in his chancery, shall be the registrar and officers of the Court of appeal, and shall be in like manner attendant upon the said Court of appeal: provided always, that any order of the said Court of appeal may and shall be drawn up by any registrar of the High Court of Chancery, if so directed by the said Lords Justices or either of them."

Mr. Little applied to the Court, under these sections, for an order giving the plaintiff, in an administration suit instituted by way of claim, leave to serve the claim on a defendant residing out of the jurisdiction of the Duchy Court.

Their Lordships made an order authorizing the proposed service to be made, and directed the order to be drawn up by the registrar of this Court.

1855. February 15, 16. March 5. Before the LORDS JUSTICES.

On the 2d August, 1826, A. D., a domiciled Scotchman married the plaintiff (then H. G. I., a domiciled Englishwoman), they having two days previously both executed a settlement in writing in the Scotch form, whereby A. D. bound himself, his heirs, executors, and successors, to pay, after his decease, an annuity to the said H. G. I., his promised spouse, for her life, and certain portions for the children of the marriage, to be divisible amongst them in manner therein mentioned. The settlement then provided as follows: "For which causes, and on the other part, the said H. G. I. hereby assigns over to and in favour of herself and the said A. D., her promised spouse, in conjunct fee and life-rent, and the child or children that shall be procreated of the said intended marriage, divisible as aforesaid, whom failing, the said H. G. I., her heirs and assigns whomsoever, in fee, all estate, funds, and effects, heritable and movable, real and personal, presently belonging, or due and addebted to her, or that may be acquired by her during the subsistence of the said intended marriage." Lastly, it was provided thereby that the provisions before written in favour of the said H. G. I. and the children of the marriage should be full satisfaction from the said A. D. of all legal

claim competent to them upon his decease. Upon the death, in 1836, of her father, a domiciled Englishman, the plaintiff became entitled under his will to a reversionary interest, expectant on the death of her mother, in one-fourth part of his personal estate. In 1841, A. D. and the plaintiff changed their domicile, which had continued Scotch since the marriage, to England. In 1842 the plaintiff's mother died, and in the interval between that event and the bankruptcy of A. D., in 1848, S., the surviving executor and trustee of the testator's will, paid, in various instalments, nearly the whole of the funds bequeathed by the will to the plaintiff to A. D., upon the joint receipt of himself and plaintiff: *Held*, that the marriage contract was to be construed by the law of Scotland, or with reference to that law; and that, when so construed, its effect was to give a life-interest to A. D. in the property coming to the plaintiff under her father's will, remainder to her absolutely, expectant upon A. D.'s decease, with a *spes successionis* only to the children of the marriage; and that, during the joint lives of the husband and wife, the *corpus* of the property was payable to the husband on their joint receipt. *Held*, also, that the plaintiff was not entitled, as against the assignees in bankruptcy of her husband, to have his future income under the settlement impounded to make good her contingent annuity thereunder. One of the instalments above mentioned was paid partly in cash and partly by setting off a debt acknowledged by A. D. to be owing by him to the testator's estate: *Held*, that the receipt, which was for the cash only under the description of "balance due to wife," was valid for the whole amount.

THIS was an appeal from the decision of the Master of the Rolls in a suit instituted for the purpose of making the trustee of a will answerable for payments made to the husband of a legatee and his assignees in respect of property bequeathed to the wife.

The question in the cause was, whether those payments * were authorized. The decision of the Master of the Rolls, * 79 obtained upon motion for a decree, was that they were not.

The facts of the case, which are detailed at length in Mr. Beavan's report of the hearing at the Rolls, (a) were shortly the following:—

On the 2d August, 1826, the defendant Andrew Duncan married, in London, the plaintiff, a domiciled Englishwoman, by her then name of Harriet Grace Inkson. Previously to this marriage, on the 31st July, 1826, a settlement (b) in writing in the Scotch form was made and executed between and by them, whereby Mr. Duncan, in consideration of 1000*l.* paid to him by the lady's father, bound himself to pay to his wife, after his decease and for her life,

(a) See 18 Beav. 136.

(b) This settlement is set forth in the course of the judgment of Lord Justice KNIGHT BRUCE; see *post*, p. 86.

an annuity of 100*l.* a year. He further bound himself to pay to the children of the marriage, after his decease, for portions, either 1000*l.*, 1500*l.* or 2000*l.*, according to their number, to be divisible according to appointment, or, in default, between them equally.

The contract then proceeded thus: "For which causes, and on the other part, the said Harriet G. Inkson, hereby assigns over to and in favour of herself and the said Andrew Duncan, her promised spouse, in conjunct fee and life-rent, and the child or children that shall be procreated of the said intended marriage, divisible as aforesaid, whom failing, the said Harriet G. Inkson, her heirs, and assigns whomsoever, in fee, all estates, funds, and effects, * 80 heritable and movable, real and personal, * presently belonging or due and addebted to her, or that may be acquired by her during the subsistence of the said intended marriage, with the whole writs, vouchers, and instructions thereof."

Then followed a clause providing that the aforesaid provisions were in full satisfaction of any claim which Harriet G. Inkson, or her children, her heirs, or successors, might make against Andrew Duncan. Andrew Duncan was, at this time, domiciled in Scotland, and he continued to be domiciled there with his wife until some time in the year 1841. In the year 1841, Andrew Duncan and his wife left Scotland, and became domiciled in England. In the mean time, Mrs. Duncan became entitled, under the will of her father, Lewis Inkson, to one-fourth of a fund which had been set apart for the purpose of answering an annuity of 400*l.* given to her mother by the will, and had also become entitled to one-fourth of her father's residuary estate, subject to the life-interest of her mother. Her mother died in the year 1842, and upon her death, Richard Shuter, the surviving executor of the father, sold out the fund set apart for securing the annuity, and paid over to Andrew Duncan the sum of 2005*l.* 16*s.*, being one-fourth of the proceeds of the annuity fund, after deducting the sum of 1000*l.*, and some interest upon it, due from Andrew Duncan to the testator. The deduction was stated on the receipt, which purported to be for "2005*l.* 16*s.* balance due to wife." On the 21st of November, 1842, Richard Shuter also paid over to Andrew Duncan the sum of 1066*l.* 5*s.* 4½*d.*, on account of Mrs. Duncan's share of the residuary estate of her father; and subsequently, between January, 1843, and September, 1846, he made other payments to the amount in the whole of 400*l.* or thereabouts to Andrew Duncan on the

same account. All these payments were made on the joint receipt of Mr. and Mrs. Duncan. In * the month of Janu- * 81 ary, 1848, Andrew Duncan became a bankrupt, and he obtained his certificate in the month of June, 1848, and subsequently to his bankruptcy, Richard Shuter paid to his assignees the sum of 80*l.* 10*s.* 11*d.*; on further account of Mrs. Duncan's share of the residuary estate of her father.

The bill was filed by Mrs. Duncan for the administration of her father's estate, insisting that the payments made to her husband and to his assignees were not properly made, and also claiming to have the income of her share of the residuary estate retained for the purpose of making good the value of the contingent annuity to which she was entitled under the settlement. The cause was heard before the Master of the Rolls, who, by his decree, declared that the payments by Shuter to the defendant Andrew Duncan, for which the plaintiff Mrs. Duncan joined in giving her receipt, were good payments, and that the trustee was not answerable in respect thereof or bound to make them good; but that the payments by Shuter to the assignees of Andrew Duncan were bad, and must be refunded by them, or, if not, that they must be made good by the trustee. The decree then went on to direct that the income of the plaintiff's share of the residuary estate ought to be paid to the assignees, subject to the retainer thereout by the defendant Shuter of the sum of 80*l.* 10*s.* 11*d.*, which was held by the Court to have been improperly paid over to the assignees.

From this decree, so far as it was unfavourable to her, the plaintiff appealed.

The opinions of the Lord Advocate (Moncrieff), the Solicitor-General (Handyside), the Dean of Faculty (Inglis), the Lord Advocate (Rutherford), and Mr. * Baillie, were taken * 82 prior to the hearing at the Rolls, upon the construction to be put upon the marriage contract, and upon the power of the husband and wife, or either of them, to give receipts under it. In the result, the prevailing opinion was, that the husband took but a life-estate in the property bequeathed to Mrs. Duncan by her father, and that the fee or *corpus* was in the wife, with a mere *spes successionis* to the children; and the opinions all concurred in holding that the sums paid on the joint receipt of the husband and wife were well and legally paid.

The Solicitor-General, Mr. Anderson, and Mr. Heming, for the appellant. — The contract in this case must, we admit, be treated as a Scotch contract, to be construed and to have effect given to it according to the provisions of the law of Scotland. Its effect when so construed is to give the husband a life-interest in the property comprised in it, with a reversion to the wife absolutely. Beyond this, no other right arises to the parties by virtue of the contract. The power to give joint receipts is not stipulated for, in express terms, by the contract, but is a capacity in the wife incident, by the general law of Scotland, to the limitations contained in it. This capacity, we submit, is merely personal, and changes with the domicile of the parties. It is to be regulated, not by the *lex loci contractus*, but by the law of the actual domicile. It is not a universal rule that every consequence from, or every right flowing out of, a contract is governed by the *lex loci contractus* irrespectively of domicile. A limitation to a person, his executors, administrators, and assigns, gives him by the English law a testamentary power over the property so limited, but this power would not follow him to a new domicile where no such dominion was conferred by it. The powers of disposition

* 88 incident to the ownership of the property * would be regulated by the actual domicile; and the same rule applies to cases of minority, coverture, and, in general, to all questions of personal capacity; Fraser on Personal and Domestic Relations, (a) Story's Conflict of Laws, (b) *Foubert v. Turst*, (c) *Lashley v. Thwaites and others, Assignees of Hogg*, (d) *Black v. Pearson*, (e) *Sill v. Worswick*, (g) *Sawer v. Shute*, (h) *Brandon v. Brandon*, (i) *Macdonald v. Macdonald*, (k) *Hitchcock v. Clendinen*, (l) *Anstruther v. Adair*, (m) *Johnstone v. Beattie*, (n) *Leslie v. Baillie*, (o) *Corsbie v. Free*, (p) *Gambier v. Gambier*, (q) *Este v.*

(a) Page 417.

(b) 2d ed., §§ 51 a, 61, 66, 69, 101, 102, 136, 141, 240, &c.

(c) Prec. in Chanc. 207, 208; 1 Bro. P. C. 129.

(d) Rob. Per. Suc. 414; Rob. App. Ca. 4.

(e) 3 Dun. B. & Mur. 504.

(m) 2 M. & K. 513.

(g) 1 H. Bl. 665.

(n) 10 Cl. & F. 42.

(h) 1 Anst. 63.

(o) 2 Y. & C. C. C. 91.

(i) 3 Swanst. 312.

(p) Cr. & Ph. 64.

(k) 8 Bell, Mur. & Yo. 830.

(q) 7 Sim. 263.

(l) 12 Beav. 534.

Smyth, (a) Guepratte v. Young, (b) Tatnall v. Hankey, (c) Male v. Roberts. (d) The validity of the discharge in this case must therefore be determined by the law of England, which declares it inoperative.

The effect of the bankruptcy has been to release the husband from the performance of the obligation contracted by him in the settlement, and which was part of the consideration for it, of making provision after his death for his wife and children in the event of their surviving him. As against the assignees of the husband, therefore, the wife and children have a right to have such contingent provision secured out of the life income of the husband under the settlement. *Ex parte Mitford, (e)*

* *Brandon v. Brandon, (g) Ex parte Gonne, in re Marsh. (h)* * 84

Sir Fitzroy Kelly, Mr. R. P. Roupell, Mr. Lloyd, Mr. G. M. Giffard, Mr. Rudall, and Mr. Roberts appeared for the several respondents, but were not called upon.

March 5.

THE LORD JUSTICE KNIGHT BRUCE. — Mrs. Duncan, the plaintiff, became under the will of her father, Mr. Inkson, entitled on the death of his widow to a share of the capital of his personal estate, but not for the plaintiff's separate use; so that, according to our law, her husband was or would have been the owner of the share in her right, subject to her equitable title to a settlement, but for the contract which I shall presently mention.

Mr. Inkson's will was English, and he died, as I understand, a domiciled Englishman. The plaintiff's marriage took place in England in his lifetime. Her husband I collect to be a Scotchman, and to have been, until and at the time of the marriage and for some years next following it, domiciled in Scotland.

Before the marriage, and in contemplation of it, they entered into a contract by way of settlement, to which her father was also a party, a contract Scotch in form, and prepared, I believe, by a

(a) 18 Beav. 112.

(d) 3 Esp. 163.

(b) 4 De G. & S. 217.

(e) 1 Bro. C. C. 398.

(c) 2 Moo. P. C. 342.

(g) 3 Swanst. 312.

(h) 3 Mont. & A. 166; and see *Ex parte Turpin*, Mon. 443; 1 Dea. & C. 120.

Scotch lawyer, but prepared, as I understand, as well as signed in England, which the husband and wife seem to have left soon

after the marriage for his home in Scotland, and for some

* 85 * time afterwards they resided as well as had their domicile in Scotland. But at last they came finally southward and became domiciled in England, and it was while they were so domiciled that the defendant Mr. Shuter, as Mr. Inkson's executor, made to the plaintiff's husband, on the joint receipts of him and the plaintiff, the payments on account of her share of the capital of Mr. Inkson's personal estate, of which the validity is disputed in this suit. She denies their validity on the ground of the contract, of which Mr. Shuter, when he made the payments, knew. He asserts that they were well made.

Now it was I think conceded at the bar, but, however this may have been, I consider it to be, from the Scotch form, the expressions, and the nature of the contract, and the husband's Scotch domicile at the time when he entered into it (a domicile which he does not appear to have intended at that time to change, and which continued at the time of the marriage), clear that the contract must receive the same construction and produce the same effect as it would have received and produced if it had been prepared in Scotland and signed in Scotland, if the domicile of the intended wife had then been in Scotland and the marriage had been solemnized in Scotland. The contract, therefore, must be construed by the law of Scotland or with reference to that law; and on this footing it is said by the plaintiff that the meaning and effect of the instrument were, after the marriage, to give her husband a life-interest in her share of her father's personal estate (which I believe was wholly English: he had been a tradesman in London or Westminster), and, subject to the husband's life-interest, to give her an absolute right to this capital. The plaintiff further says that, according to the English law, when, by means of a contract within its influence, mere personalty becomes thus circumstanced, the husband and wife cannot together,

* 86 * nor can either separately, during their joint lives sell, assign, or encumber the capital as against the wife surviving; and from these propositions she infers that the payments in question, made as they were after her husband's domicile and hers had become English, were ill made, and cannot be effectually alleged by Mr. Shuter against her.

To this, however, I cannot agree. The inference seems to me altogether unwarrantable.

The terms of the contract, so far as material here to be attended to, are thus :—

“ It is contracted and agreed upon matrimonially between Andrew Duncan, of the city of Aberdeen, merchant, on the one part, and Harriet Grace Inkson, daughter of Lewis Inkson, of the Adelphi, Strand, London, merchant tailor, with the consent of her father, on the other part, in manner following (that is to say), that the said Andrew Duncan and Harriet Grace Inkson have accepted and hereby accept of each other in marriage, and engage to solemnize the same in due form and without delay, in contemplation whereof and in consideration of 1000*l.* sterling by the said Lewis Inkson, as a portion with his said daughter presently paid to the said Andrew Duncan, the receipt whereof is hereby acknowledged, and of the assignation by the said Harriet Grace Inkson under-written, the said Andrew Duncan hereby binds and obliges himself, his heirs, executors, and successors whomsoever, to make payment to the said Harriet Grace Inkson, his promised spouse, in the event of her surviving him, of a free yearly annuity of 100*l.* sterling during all the days of her lifetime after his decease, and that at the terms of Whit-Sunday and Martinmas in each year, by equal proportions, beginning the payment * at the * 87 first of these terms that shall happen next ensuing his decease for the first half-year, and so forth to continue the payment of the said annuity of 100*l.* yearly, termly, and proportionally down to the day of her death, together with one-fifth part more of such termly payment of the said annuity as liquidate penalty in the event of failure of the punctual payment thereof, and the legal interest of each termly payment of the said annuity from and after the term when the same shall become due during the non-payment thereof ; and, further, the said Andrew Duncan binds and obliges himself and his aforesaid to aliment the said Harriet Grace Inkson, his promised spouse, from and after the day of his decease until the first termly payment of the said annuity shall become due ; and also, in the event of her surviving him, to provide her with suitable furniture for a dwelling-house for her residence after his decease, which furniture shall become the absolute property of the said Harriet Grace Inkson, or in lieu thereof or in

her option to make payment to her of the sum of 200*l.* sterling at the first term of Whit-Sunday or Martinmas that shall happen next ensuing his decease, for the purpose of enabling her to provide herself with one-fifth part more of the sum as liquidate penalty in the event of failure in the punctual payment thereof, and of the legal interest of the principal sum from and after the said term of payment during the non-payment thereof. Moreover the said Andrew Duncan binds and obliges himself and his aforesaid to make payment to the child or children that shall be procreated of the said intending marriage: if there be only one child surviving the father, to him or her the sum of 1000*l.* sterling; and if there be two children surviving the father, to them the sum of 1500*l.* sterling; and if there be more than two children surviving the father, to them the sum of 2000*l.* sterling, divisible the said

* 88 sum of 1500*l.* or 2000*l.* among the * several children in such a manner and in such proportions as shall be directed and appointed by any writing executed by their father, or, failing him, by their mother after his decease; and in the event of his surviving her, or failing such direction and appointment, divisible among the said children in equal proportions, share and share alike, and payable the said sum of 1000*l.* or 1500*l.* or 2000*l.* at the first term of Whit-Sunday or Martinmas that shall happen next ensuing the decease of the said Andrew Duncan, with one-fifth more thereof as liquidate penalty in the event of failure in punctual payment of the same, and legal interest of the principal sum from and after the said term of payment during the non-payment thereof: for which causes and on the other part the said Harriet Grace Inkson hereby assigns and makes over to and in favour of herself and the said Andrew Duncan, her promised spouse, in conjunct fee and life-rent, and the child or children that shall be procreated of the said intended marriage, divisible as aforesaid, whom failing, the said Harriet Grace Inkson, her heirs and assigns whomsoever, in fee, all estate, funds, and effects, heritable and movable, real and personal, presently belonging or due and addebted to her, or that may be acquired by her during the subsistence of the said intended marriage, with the whole writs, vouchers, and instructions thereof, and all following or competent to follow thereupon; and it is provided and agreed that the provisions before written in favour of the said Harriet Grace Inkson and the child or children that shall be procreated of the said intended marriage are and shall be full satis-

faction from the said Andrew Duncan and his heirs, executors, and successors aforesaid to them respectively of all legal claim competent to the said Harriet Grace Inkson upon the predecease of the said Andrew Duncan, or competent to her heirs and successors upon her predecease, and also of all legal * claim compe- * 89 tent to the said child or children upon the decease of their father and mother, or either of them, and the said provisions are hereby accepted of accordingly."

I have read as far as I have for the purpose of also reading a provision which has, I think, no bearing upon my present remarks; but which I read rather for the purpose of showing that it has not escaped my attention in what I shall have to say on the subject of trustees: "And it is further provided and agreed, that execution shall pass and be effectual hereupon, in name and at the instance of John Inkson, brother of the said Harriet Grace Inkson, George Henry Anderson, late of Old Aberdeen, now of Northampton Square, London, and John Duncan, and James Duncan, both brothers-german of the said Andrew Duncan, or either of them, or of such other person or persons as shall be appointed by the said Lewis Inkson"—that is the father—"to act in the room and place of the persons above named, who may not act against the said Andrew Duncan, and his heirs and successors aforesaid, for implement of the obligations by him in favour of his said promised spouse and the child or children of the said intended marriage, or either of them, hereinbefore written."

I have read certain provisions on the husband's part for the benefit of the wife and children.

The expressions of this contract, however, are expressions with which the English law is not familiar, which it does not indeed understand. They are foreign. It knows nothing of conjunct fee and life-rent, nothing of an express provision for children being no provision at all for children. The interpretation, coming, as it must, from Scotland, tells us that the meaning of the terms * used is, not only that the children take nothing, but also, * 90 among other things, that capital thus circumstanced is, during the joint lives of the husband and wife, payable to the husband on their joint receipt. This quality accompanies the

state for which the contract provides, is in truth a part of it, is that without which the thing is not.

Those who assert that the contract gave the wife a reversionary or future or contingent interest, cannot avoid, at the same time, on the same grounds, asserting a power or right in the husband to receive the capital on the joint acknowledgment of himself and his wife. His domicile at the time of the contract and at the time of the marriage may be material, not so his or her subsequent domicile or domiciles. She was intended to be and was qualified by the contract to consent in this respect, of whatever country they should, after the marriage, become domiciled inhabitants; nor can it be assumed that either of them would have entered into an engagement locking up the capital from each during their joint lives.

I will, at the risk of repetition, say distinctly that, in my opinion, the contract, on the face of it, exhibits an intention that the personal property which should be affected by it should, during the joint lives of Mr. and Mrs. Duncan, be, as to the capital, received or receivable by him with the assent of both. The words descriptive of property are general; there is no specification. The wife's father, whose will has furnished the materials for the contest, was living at the time of the marriage. The contract does not appoint or provide for the appointment of any trustee other than the husband and wife themselves, and I find it impossible to ascribe to either of them such an intention, in making it, as that the personal property subjected to it should, to

* 91 use a * phrase familiar to us, be "brought into Court," or that trustees or a trustee should be appointed for the purposes of it during the joint lives of Mr. and Mrs. Duncan other than themselves. The instrument accordingly, as I have mentioned, seems to me *ex facie* to show that, if there were to be trustees under it or for its purposes, they were intended by it to be the trustees, and that into their hands, or the hands of the husband with the wife's assent, the personalty subjected to it was to come: nor, if the English law ought to be looked to, does that prohibit a husband and wife from being their own trustees or trustees for either of them; it being clear that, if a will or settlement, in every sense and for every purpose English, should provide that a husband and his wife, or either of them, should be

the trustees, or be the trustee of personalty for the benefit of him for life, and after his death of the wife absolutely, effect must be given to that intention.

The law of England, too, does not regard as inconvenient or ineffectual, but allows, a contract between a man and a woman intending to marry each other, that after their marriage she shall, with his consent, or even without it, have power and capacity to dispose of all such reversionary, deferred, and contingent interests in property as, under the contract or otherwise, may, during the marriage, belong or come to her or to him in her right. What else substantially is there in the point now under consideration? If we place the contract out of view, of course the payments to the husband must stand good. If we introduce it, we must introduce it as a Scotch contract with all the incidents of a Scotch contract, so far at least as not prohibited by the English law; and it is not, I repeat, prohibited by the English law that a married woman should have conferred on her the power and capacity just referred to. Whether, therefore, we regard or disregard the contract, whether we consult the English * law or the law of Scotland, * 92 or both, the decree seems to me plainly right in this respect. It was, perhaps, arguable whether the receipt for the largest amount was good to the extent of the sum allowed by the husband, as a debt due from him to the testator. But, according to the true import of the language of the document, the wife must, I think, be taken to have sanctioned this by her signature, and consented to it.

The only other point controverted before us has been, as to the alleged right of lien or retainer for the plaintiff's contingent or deferred annuity and right to aliment and furniture under the marriage contract, which she claims against her husband's life-interest under it, now belonging to his assignees. There is evidence that this claim is not warranted by the law of Scotland, nor do I think it warranted by the law of England. There has been no breach by the husband of any obligation which the marriage contract imposed on him, unless so far, if at all, as his English bankruptcy and his certificate under it can be considered as amounting to such a breach; and I am of opinion that they cannot be so considered. The law of the country has substituted, in lieu of the possible right of resort to his assets, if any, after his death, for the posthumous provisions in her favour, or so much of them

as the certificate has affected, a right to a portion of his estate, if any, during his life. But this does not entitle her to say that he has broken any engagement. She had no lien while he was solvent. The bankruptcy gave her none.

I think the decree correct altogether; nor have I often seen an appeal so little entitled to favourable consideration.

* 93 *THE LORD JUSTICE TURNER.—My learned brother has gone so fully through the facts of the case that it is unnecessary for me to recapitulate them.

The principal question raised by this appeal is, whether the defendant Shuter is liable to pay over again the several sums of money paid by him, as executor of Lewis Inkson, to Andrew Duncan, the husband of the plaintiff, before he became bankrupt. It was not disputed at the bar, and, as I apprehend, admits of no question, that the marriage settlement in this case must be construed according to the law of Scotland; and the evidence in the cause shows what, according to that law, was its operation and effect. It establishes that, according to the law of Scotland, Andrew Duncan, the husband of the plaintiff, became entitled to a life-interest in the property coming to the plaintiff under her father's will; that the plaintiff became entitled to the capital of the property expectant upon his decease; that the children of the marriage took no interest in the property beyond a mere *spes successionis*; and, taking it in the view most favourable to the plaintiff, it further establishes that Andrew Duncan and the plaintiff were entitled to receive the property. Some doubt, indeed, is suggested whether Andrew Duncan's *jus mariti* was excluded by the settlement; and whether, therefore, he was not alone entitled to receive the property. But it is obvious that this view of the case would be less favourable to the plaintiff, and I do not think it necessary to enter into that question.

The point contended for on the part of the plaintiff was this: it was admitted on her part that, so far as the contract extended, it must govern the rights and interests of the parties, not-

* 94 withstanding the subsequent change of * domicile; but it was insisted that the right to receive these sums was not governed by the contract, but was a mere incident to the estates created by the settlement; and that the change of domicile destroyed that incident. This argument appears to me to be more subtle

than sound. The parties, at the date of the settlement, were contracting as to the future property of the wife; and the plaintiff, in asking us to assume that the rights in that property were to be wholly governed by the estates created, is, in truth, asking us to assume that the parties contracted as to the estates which they were to take, but wholly disregarded the rights which were involved in the creation of those estates. Such an assumption appears to me to be wholly unwarranted. I find nothing in the authorities which were referred to, or in any other cases, and I see no principle, which would warrant it. The parties having contracted for estates which would give them the right jointly to receive the property, must, I think, be taken to have contracted that they should have the power jointly to receive it. To hold otherwise would, as it seems to me, be to regard the form and disregard the substance.

That it was part of the contract upon this marriage, evidenced by the settlement, that the husband and wife should have the right to receive this property, I feel no doubt; and it cannot, I think, be said to have been less a part of the contract, because the right to receive was incident to the estates created. If the parties had intended that the husband and wife should not have the right to receive the property, they would have framed the settlement in some different mode; which they might well have done.

A further point was urged on the part of the plaintiff with reference to these sums, that the receipt for the first * sum * 95 did not cover the amount which was deducted in respect of Andrew Duncan's debt; but I think this point is as untenable as the last. The parties had the right to receive the amount which was deducted. In the receipt they dealt with it as a sum deducted in effect, in the same manner as if the debt had been paid to Shuter and repaid by him. It could not be necessary for them to go through the mere form of the payment and repayment being actually made.

The only remaining question is as to the right of the plaintiff to have the life income retained to make good the value of her contingent annuity. I do not think that this point is altogether free from difficulty; but the conclusion at which I have arrived upon it is, that the decree is right in this respect also. The equity contended for did not exist before the bankruptcy of Andrew Duncan. Upon his bankruptcy the whole of his interest under the settle-

ment passed to the assignees. The statute has given a right of proof against his estate; but I think this right of proof cannot be held to have created an equity which had no antecedent existence.

For these reasons I am of opinion that this appeal must be dismissed with costs.

1855. March 6. Before the LORDS JUSTICES.

A testator bequeathed as follows:—

“I give to my daughter S. 50*l.* per annum for life. I give to each of my other daughters 5000*l.*, the interest of which for their use independent of any husband they may have, and if they should have any children the principal to be divided among them after her death if they should attain the age of twenty-one years; if not it is to be divided between her surviving sisters, share and share alike.” The testator died, leaving S. and four other daughters, A., B., C., D., surviving. Of these, A. afterwards died, leaving two children, both of whom died under twenty-one, and B. survived A., but died before the survivor of her children: *Held*, that the 5000*l.* bequeathed to A. became, upon the death of the survivor of her children, divisible amongst her sisters, including S., then surviving, in exclusion of the representatives of B.¹

P. GILBERT, the testator in the cause, by his will, bequeathed (*inter alia*) as follows: “I give and bequeath to Mary, my dearly beloved wife, the sum of 500*l.* per annum, for her life, together with my household goods, moneys, and plate, in my house at Earl’s Court for her use for life. I give to my daughter Sabina 50*l.* per annum for her life. I give to each of my other daughters the sum of 5000*l.* to be placed in the 3*l.* per cents, the interest of which to be for their use, independent of any husband they may have, and if they should have any children the principal to be divided among them after her death, if they should attain the age of twenty-one years; if not, it is to be divided between her surviving sisters, share and share alike.”

The testator died in August, 1825, leaving five daughters sur-

¹ See the cases cited in notes to *Neathway v. Read*, 3 De G., M. & G. 17, 18, 21, 22; 2 *Jarman Wills* (3d Eng. ed.), 142, 672, 694, 698; *Cambridge v. Rous*, 25 Beav. 411.

living. Sabina, one of these, then Mrs. Bowden, a married woman, died in 1834, leaving two children, both of whom afterwards died before attaining the age of twenty-one years. Sophia, another of the testator's daughters, also a married woman having children, survived her sister Sabina, but died before the death of the last surviving child of Sabina. The question upon the appeal was whether the appellant, as surviving *husband *97 and personal representative of Sophia, was entitled to a share of the 5000*l.* which, upon the death of the last surviving child of Mrs. Bowden under age, became divisible between her surviving sisters.

The Master of the Rolls, by the decree appealed from, had decided that only those sisters of Sabina who survived both her children were entitled to participate in the fund. (a)

Mr. Lloyd and *Mr. De Gez*, in support of the appeal.—The words “her surviving sisters,” in their ordinary grammatical signification, mean sisters who should survive “her,” viz., the sister who might die without leaving children who should attain twenty-one, and there is nothing in the will to give them any other meaning. To hold that, in order to satisfy them, the surviving sisters must not only outlive the deceased one, but must live till some period to be conjectured or inferred from the words “if not,” is going far beyond any authority or reasonable latitude of construction, and for the purpose of accomplishing no probable intention of the testator. They referred to *Neathway v. Read*, (b) *Edwards v. Edwards*, (c) *Cripps v. Woolcot*. (d)

Mr. Roupell and *Mr. Ayrton*, *Mr. Roundell Palmer* and *Mr. Denison*, *Mr. Baggallay*, *Mr. Tennant*, and *Mr. Goren*, who appeared for the different respondents, were not called upon.

Their Lordships said that they agreed with the Master of the Rolls in the view that his Honor took of the will.

(a) See 18 Beav. 541.

(b) 3 De G., M. & G. 18.

(c) 15 Beav. 357.

(d) 4 Mad. 11.

1855. March 16, 29. Before the LORDS JUSTICES.

The mere fact of marriage with a female ward of Court, without the Court's consent, *held*, to confer upon the Court a jurisdiction to decline, during the joint lives of the husband and wife, to part with a fund in its own power and custody belonging to the ward, even upon the application of the husband and wife upon the consent of the wife in Court, until such settlement should have been made thereof as should appear advisable and proper under the circumstances of the case.¹

Whether in such a case it would be in the power of the Court or correct to enforce a settlement against the wishes both of the wife and husband, *quære*.

THIS was an appeal from an order made by Vice-Chancellor KINDERSLEY upon a petition presented to him by a husband and wife, who had married without first obtaining the sanction of the Court, the lady being at the time an infant ward of Court.

The petition prayed that, pursuant to an agreement for a settlement made upon the marriage, 1000*l.*, part of a sum of 2519*l.* 2*s.* 3*d.*, stock standing in Court to the credit of the wife in the above-mentioned cause, might be paid to the trustees of the marriage settlement, upon the trusts thereof for the benefit of the wife and the children of the marriage (if any); and that the remainder of the stock, together with a sum of 695*l.* 18*s.* 2*d.* cash, also in Court to the credit of the lady in the cause, might be paid, after deducting the costs, to the husband.

The petition was presented shortly after the lady came of age, her interest in the funds in Court (which, by an order of the Court, was declared to be contingent upon the happening of that event) having thereupon become a vested interest.

The husband had made no settlement of property of his own, and it appeared that the only property of which he was possessed in his own right was a salary of 200*l.* a year which he earned

* 99 as clerk to certain hop merchants, * and a leasehold brewery at Norwood valued at 1500*l.*, and producing an annual rental of 100*l.*

The wife appeared both before the Vice-Chancellor and before

¹ See *Biddles v. Jackson*, 3 De G. & J. 544.

the Court of appeal, for the purpose of giving her consent to the application of the funds in Court according to the prayer of the petition.

By the order appealed from, the Vice-Chancellor, on the ground that the marriage, without applying for the consent of the Court, was a contempt of Court on the part of the husband, and that such contempt was left unexplained, directed that the whole sum of stock in Court should be settled upon the wife and children (if any) of the marriage in the usual manner, and the sum of cash paid to the husband, after deducting the costs.

In support of the petition of appeal, affidavits were produced and read on behalf of the petitioners, from which it appeared that at the time when the husband contracted to marry his wife, in 1852, he was not aware that she was entitled to the funds in question, or to any other property; that, on ascertaining that fact, he made inquiries of the solicitors for the plaintiff in the suit whether the lady was a ward of Court; that he was informed by the solicitors that she could not be considered a ward of Court, and that he might safely marry her without applying to the Court; that he thereupon married her in January, 1853, with the consent of her mother and the trustees of the will, having, previously to the marriage, written a letter undertaking, in the event of her becoming entitled to the funds in Court, to settle 1000*l.*, part thereof, to her separate use; and lastly, that, upon the lady attaining her majority, a settlement in conformity with such antenuptial agreement had been prepared, and that the petition to the Vice-Chancellor * had been presented for the * 100 purpose of carrying it into effect.

Mr. Roupell and *Mr. W. D. Lewis*, in support of the appeal. — It is submitted that, under the circumstances disclosed by the affidavits filed since the hearing of the petition by the Vice-Chancellor, no contempt has in fact been committed by the husband in this case. The case is clearly distinguishable in that respect from *Stackpole v. Beaumont*, (a) which was the case of a runaway marriage.

[THE LORD JUSTICE KNIGHT BRUCE. — Marriage with a ward of Court, without the consent of the Court, is of itself a con-

tempt. Although it may have been committed under such circumstances that the Court may not think fit to award any punishment for it, still, for all the purposes of jurisdiction over the wife's property, it is a contempt.]

Admitting, then, the marriage to have been a contempt, still as it has been explained by the affidavits, and does not appear to have been intentional, the Court will not punish the husband, but will attend to the joint request of the husband and wife. The wife having now attained her majority, and consenting to the payment of the funds out of Court, the Court will not, it is submitted, act in opposition to that consent, or dispose of her property contrary to her wishes, as shown by it. The contempt gives the Court jurisdiction as against the husband, to compel him to do what is required, but it does not take away the rights of the wife.

Leeds v. Barnardiston, (a) *Long v. Long*, (b) *Austen v. Halsey*, (c) *In re Walker*, (d) * *Day v. Day*, (e) *Bennett v. Biddles*. (g) It has been held, that the Court will not take the consent of a married woman while a minor: *Stubbs v. Sargon*, (h) *Abraham v. Newcombe*, (i) from which it is to be inferred that the consent will be taken as the guide where the wife is of age.

Mr. Speed, for the plaintiffs, was not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — Upon the question of jurisdiction I entertain not the slightest doubt. It is a point with which the nature of the contempt, whether criminal in fact and substance, or only so technically, has nothing to do. The jurisdiction arises from the mere fact of the marriage of a ward of Court without the consent of the Court. The manner or extent in which or to which the husband shall be punished, or whether he shall be punished at all, must of course depend upon the circumstances of each particular case. In this instance there has been nothing substantially criminal, nothing immoral. There were, no doubt, good intentions on all sides, but that took place which gave the

(a) 4 Sim. 538.

(b) 2 Sim. & S. 119.

(c) 2 Sim. & S. 123, n.

(d) Lloyd & G. 299.

(e) 11 Beav. 35.

(g) 10 Jur. 534.

(h) 2 Beav. 496.

(i) 12 Sim. 566.

Court jurisdiction over the husband and wife; a jurisdiction not capable of being removed by the mere consent of the wife, whether of age or not of age. The case may stand thus, — that it may not be in the power of the Court or correct to enforce a settlement against the wishes both of the wife and husband. That is a point upon which at present I decline to give any opinion; but the Court clearly has this jurisdiction; viz., to decline parting with the capital of a fund within its own power and custody, belonging to the wife, even * upon the * 102 application of both, and the consent of the wife in Court during their joint lives, until such a settlement shall be made as the Court may think advisable and proper under the circumstances. I repeat, therefore, that I do not mean to say now that a settlement is to be forced upon the gentleman and lady, but this I mean most distinctly to say, so far as I am concerned, that, without a settlement discreet and proper under the circumstances being made, not one shilling of the capital of the fund shall, during the joint lives, be touched with my consent.

THE LORD JUSTICE TURNER. — My opinion coincides with that of my learned brother upon the question of jurisdiction. The case of *Austen v. Halsey* has always seemed to me to be an authority decisive upon that point. My view of the case is this, that the marriage is a contempt of the Court, a contempt indeed often overlooked, but still creating a jurisdiction over the husband which is capable of being enforced against him at any time, and which cannot be removed by the wife's consent to the fund being paid to him. When she consents to such payment she, in effect, asks that the payment may be made to a person who is in contempt, and the Court exercises its discretion whether it will make the payment or not. In exercising this discretion the Court, as I apprehend, is guided by the consideration of what is most for the benefit of the wife and children, and as a general rule I take it the Court will give its sanction to any arrangement which a prudent father would approve of.

THE LORD JUSTICE KNIGHT BRUCE. — It seems highly probable that I shall not be induced to accede to a settlement by which 1000*l.* only of the * lady's fortune shall be settled * 103 upon her, and all the rest of her property become that of her husband.

The case was then allowed to stand over with a view to an arrangement being come to, comprehending a provision of the following character suggested by Lord Justice TURNER; viz., that the husband, who had leasehold property of his own, should insure his life in a competent sum, charging the payment of the premiums upon the policies upon such leasehold property, so as to create a fund, which, in the event of his death, would be available for the benefit of his wife and children.

March 20.

The case was again mentioned, and an arrangement sanctioned by the Court, whereby the husband was to be allowed to receive the greater part of the funds in Court, he insuring his life for a competent sum, the payment of the premiums on such insurance being secured upon his leasehold property, and the sum secured thereby, being, together with the remainder of the funds in Court, settled upon the wife and children. The settlement, moreover, to contain a covenant on the part of the husband, to settle upon the like trusts any property the wife might afterwards become entitled to.

* 104

* RABY v. RIDEHALGH.

March 17, 20. Before the LORDS JUSTICES.

Personalty was bequeathed upon trust for tenants for life, with executory trusts in remainder, but without directions as to investment. The trustees at the instance of the tenants for life abandoned their original intention of investing in the funds, and invested on mortgage so as to obtain an increased income, but it did not appear that the tenants for life approved of the particular securities which were taken and which proved insufficient. On the trustees being decreed to make good the loss: *Held*, that the tenants for life and their interests in the trust funds were liable to recoup to the trustees the amount ordered to be paid by them to the extent of the income received by the tenants for life respectively from the mortgages.¹

Semble, that in the absence of directions as to investment trustees cannot properly invest on mortgage.²

¹ See *Lewin Trusts* (5th Eng. ed.), 259, 269, 656; *Brown v. Maunsell*, 5 Ir. Ch. R. 351; *Bentley v. Robinson*, 9 Ir. Ch. R. 479; *Bate v. Hooper*, 5 De G., M. & G. 338.

² See *Lewin Trusts* (5th Eng. ed.), 255, 256; *Hill Trustees* (3d Am. ed.),

THIS was an appeal from the decision of Vice-Chancellor STUART, holding that the appellant, who was tenant for life under a will, was liable to recoup to the trustees of the will a sum which they had been decreed to pay in respect of a breach of trust.

The trust was created by a codicil to the will of William Raby, dated the 8th of May, 1830, whereby he gave one moiety of the residue of his real and personal estate to George Lewis Ridehalgh and Peter Roylance, upon trust for the testator's son, William Raby the elder, during his life, and after his death upon certain trusts for the benefit of his children; and the other moiety to the same trustees for the testator's other son, John Spencer Raby the elder, during his life, and after his death upon certain trusts for the benefit of his children, but there were no powers or directions for the investment of the personal estate. After the death of the testator in 1832, the trustees invested part of the personal estate, amounting to 15,495*l.*, in mortgages on real estates which ultimately turned out deficient.

In 1844, William Raby, the elder, and his children, filed a bill against the trustees, charging them with a breach of trust in investing on insufficient securities, and seeking * to make * 105 them liable for the deficiency. The bill was afterwards amended by naming William Raby the elder as a defendant, and leaving his children sole plaintiffs. He had since died. The trustees alleged in their answer that the tenants for life had themselves induced them to make the investments complained of; and at the hearing of the cause a reference was directed to the Master to inquire as to the particulars of the investments, and whether they had been made at the instance, or request, or with the authority of the tenants for life.

The Master by his report, which had been confirmed, found that there was a deficiency of 1895*l.* in the trust estate, of which 635*l.* had been paid to the tenants for life out of the capital, and 1260*l.*

537-540 and notes, 564 and note; Perry Trusts, § 457; Ungless v. Tuff, 30 L. J. Ch. N. S. 784; Equitable Int. Soc. v. Fuller, 1 J. & H. 379; 7 Jur. N. S. 307; Cohen v. Waley, 7 Jur. N. S. 937; Baud v. Fardell, *post*, 628. Investments on mortgages upon real estate have not been regarded as objectionable in the United States, but on the contrary have been treated with favor. Perry Trusts, § 458; Hill Trustees (3d Am. ed.), 540 in note; Twaddell's App. 5 Barr. 15; Worrell's App. 9 Barr. 508; Rush's Estate, 12 Penn. St. 375; *Ex parte Huff*, 2 Barr. 227; Robinson v. Robinson, 1 De G., M. & G. 247, 263 and notes.

arose from loss occasioned by the insufficiency of the securities. He also found as follows: " And I do not find that such particular investments, or any of them, were or was made at the instance or request, or with the authority of the defendant, John Spencer Raby the elder, and the late defendant, William Raby the elder, or either of them, but I find that it was the intention of the trustees to invest in the public stocks or funds, the whole of the trust moneys in their hands, as the trustees of the will of the testator, and that at the instance and request of the defendant, J. S. Raby the elder, and the late defendant, William Raby the elder, who were anxious to secure as large an income as they could, such intention was abandoned, and that it was also at their instance or request arranged, that the said trust-moneys should be advanced and lent upon mortgage, so as to secure a higher rate of interest than could have been obtained by investing the same in the public stocks or funds; and I find that the said John Robinson, to whom

the said trustees referred the said John Hall, (a) as afore-
 * 106 said, * and who subsequently acted in, and relating to, such several advances and mortgages or securities as are hereinbefore mentioned, was employed and acted for the said trustees in and relating to such several mortgage transactions as aforesaid, with the general privity and concurrence of the defendant, J. S. Raby the elder, and the late defendant, W. Raby the elder, and that they were respectively aware, that mortgages had been taken and were from time to time being taken by the said trustees for different portions of such trust moneys as aforesaid, under the advice of the said J. Robinson, whom the said defendant, J. S. Raby the elder, and the late defendant, W. Raby the elder, were in the habit of seeing or communicating with."

By the order under appeal it was declared, that the surviving trustee Peter Roylance, and the estate of the deceased trustee G. L. Ridehalgh, were liable to make good the loss which had arisen to the trust estate from the improper investments; and Roylance and the administrator of the deceased trustee, who admitted assets, were ordered to pay into Court the amount of the loss.

It was also declared, that J. S. Raby the elder, and the personal estate of W. Raby the elder, and their respective life-interests in

(a) One of the mortgages.

the trust estates, were bound and liable to recoup to the trustees the sum thereinbefore directed to be paid into Court, and it was ordered, that such sum should be paid accordingly by J. S. Raby and Dinah Raby, the executrix of William Raby the elder, to the defendant P. Roylance and T. Howard, the administrator of G. L. Ridehalgh, and if Dinah Raby should not admit assets, then the usual accounts of William Raby's estate were ordered to be taken. No order was made as to the costs of the trustees.

* Directions as to the investment of the funds in Court * 107 were given, and as to those parts in which J. S. Raby had a life-interest, it was ordered, that the dividends should from time to time be paid during the life of J. S. Raby, or until further order to the defendants, Roylance and Howard, towards satisfaction of what was to be recouped to them under the provisions of the order.

From this order J. Spencer Raby appealed.

Mr. W. M. James and *Mr. Selwyn*, for the appellant. — The trustees ought to have been decreed to pay the costs of the suit, and were not entitled to have their payments recouped out of J. S. Raby's life-interest. He did not concur in these particular investments. He merely agreed to an investment on mortgage generally, which is a proper description of investment. That did not authorize the trustees to invest on securities insufficient in value.

They referred to *Booth v. Booth*, (a) *Brice v. Stokes*, (b) *Traf-ford v. Boehm*, (c) *Walker v. Symonds*, (d) *Kellaway v. Johnson*, (e) *Norbury v. Norbury*, (g) *Lyse v. Kingdon*, (h) *Lord Montford v. Lord Cadogan*, (i) *Phillipson v. Gatty*, (k) *Woodyatt v. Gres-ley*. (l)

Mr. Bacon, *Mr. Malins*, and *Mr. Hamilton Humphreys*, for *Mr. Roylance*. — The decree is right, for the trustees were about to invest in the funds, but were persuaded by the tenants for life to invest on mortgage.

- (a) 1 Beav. 125.
- (b) 11 Ves. 319.
- (c) 3 Atk. 440.
- (d) 3 Swanst. 1.
- (e) 5 Beav. 319.

- (g) 4 Madd. 191.
- (h) 1 Coll. 184.
- (i) 17 Ves. 485.
- (k) 7 Hare, 516.
- (l) 8 Sim. 180.

* 108 [THE LORD JUSTICE TURNER. — *Has the Court, in a suit of this nature, ever gone the length of ordering the *cestuis que trustent* personally to recoup the trustee?]

In *Trafford v. Boehm* (a) it was held that this Court will endeavour to relieve the trustee, and that the estate of a *cestui que trust* concurring in a breach of trust is, in the first place, liable to indemnify the trustee in respect of it.

Mr. Wigram and *Mr. Little* appeared for the personal representatives of *Mr. Ridehalgh*.

Mr. Elmsley and *Mr. Dryden*, for the representative of *William Raby* the elder.

Mr. Walker and *Mr. J. V. Prior*, for the plaintiffs.

Mr. W. M. James, in reply.

The Lord Justice TURNER (after stating the facts of the case) proceeded as follows: The first question which arises upon this appeal is whether, under the trusts of this will, the trustees were justified in laying out the trust money upon mortgage at all. That is a question which may admit of some difficulty, and is one upon which I desire to give no conclusive opinion. I am not disposed to hold out any encouragement whatever to the notion that a trustee, in the absence of any power for that purpose, is entitled to lay out the trust fund upon mortgage. I desire to be understood as not giving any sanction to that notion. The circumstances of this case are such as to render it unnecessary to decide the point. For assuming that an executor or trustee, acting in the ordinary exercise of the discretion belonging to him in that character, could properly make such an investment of the

* 109 trust fund without any * power expressly given to him so to do, it is clear that, in making such an investment, it is his bounden duty to have regard to the rights and interests of all parties concerned, and if it appears that he has made the investment at the instance and for the benefit of one or more of *cestuis*

(a) 3 Atk. 440, 444.

que trustent, without having regard to the interests of the others, and loss has resulted from the investment, that is a breach of trust for which he and his estate must be made responsible. Now the finding of the Master in the present case is: [His Lordship read it.]

In that state of circumstances, these investments having been made at the instance and request of the *cestuis que trustent* for life, I take it to be clear that the act done by the trustees was unwarranted, and amounted to a breach of trust for which the trustees were liable.

The trustees, then, being liable to replace those trust funds, the next question is, What is the extent of liability which attaches upon the *cestuis que trustent* for life in consequence of their having induced the trustees to commit the breach of trust? Now the *cestuis que trustent* for life who instigated the trustees to commit the breach of trust have derived from that breach of trust the advantage of enjoying the increased income of the fund not duly invested according to the trust, and the consequence of that is, that the *cestuis que trustent* in remainder have a right to have that income refunded and made good by the *cestuis que trustent* for life. It is trust money received by them under a breach of trust to which they were privy, and the effect, I apprehend, must be that, as the loss which ought to fall on those who instigated the breach of trust has been laid by the Court upon the trustees, the trustees are entitled to stand in the place of the *cestuis que trustent* in remainder, for the purpose of recovering against the *cestuis que trustent* for life who * instigated the breach of * 110 trust, or their estates, the benefit actually received by them in consequence of such breach of trust. It seems to me to be the necessary consequence of the *cestuis que trustent* for life having received the income of the trust fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trustent* for life, or their estates, to the extent to which those estates have been benefited by the improper investment.

The decree, however, of the Vice-Chancellor goes, I think, a little too far, more, I think, in form than in substance. The decree declares that the tenants for life, and their estates, and their respective life-interests in the trust fund, are liable to recoup the trustees the sum they were ordered to pay in respect of the loss occasioned by the breach of trust, and it then orders payment

of that sum to the surviving trustee and the personal representative of the deceased trustee by the surviving *cestuis que trust* for life, and the representative of the deceased *cestuis que trust* for life. The effect of the order as worded might be to throw upon each of the tenants for life the whole of the amount to be made good by both of them to the trustees, although part or the whole of such amount may have been received by one of the *cestuis que trustent* for life only, and the effect moreover of the decree as worded is to charge the *cestuis que trustent* for life or their estates with the whole sum the trustees have been ordered to pay, without there being any *constat* that the amount received by the trustees in breach of their trust was in fact ever paid over to the *cestuis que trustent* for life or either of them. With the alterations, formal rather than substantial, necessary to meet these objections, the decree will declare that John Spencer Raby the elder and

* 111 the estate of W. Raby the elder are respectively, * to the extent of the sums received by the said J. S. Raby the elder and W. Raby the elder respectively out of the capital, and to the further extent of the sums received by them respectively for or in respect of the interest on the mortgages on which the trust funds have been invested, liable to make good to the defendant Roylance and the estate of Ridehalgh the said sum of 1895*l.* 5*s.* 8*d.* directed by the decree to be paid by them, or so much thereof as may be paid by them; and that the life-interest of J. S. Raby the elder in one moiety of the testator's residuary estate and what may be owing in respect of the life-interest of W. Raby the elder in the other moiety of the residuary estate, are respectively liable to make good to the defendant Roylance and the estate the amount for which J. S. Raby the elder and the estate of W. Raby the elder are respectively declared to be liable.

Then there must be an account of the sums received by the tenants for life for interest on the mortgages.

As to costs, the appellant not having succeeded in the substance of the appeal, the alteration in the decision being formal only, the decree must remain unaltered as to the costs of suit, and the appellant must pay the costs of the appeal.

The Lord Justice KNIGHT BRUCE concurred.

* MYERS v. THE UNITED GUARANTEE AND LIFE * 112
ASSURANCE COMPANY.

THE UNITED GUARANTEE AND LIFE ASSURANCE COM-
PANY v. CLELAND.

1855. April 17, 18. Before the LORDS JUSTICES.

Policy holders whose claims for payment were disputed by the insurance company, deposited the policy as a security. The depositors brought an action in the name of the depositors against the company, and, pending the action, sub-mortgaged the policy with other securities. Afterwards the depositors gave notice to the sub-mortgagees to hold at the disposal of a bank any "balances" which might be due from the sub-mortgagee to the depositors, and the bank at the same time wrote a letter to the sub-mortgagees, who sent an answer, and both the letter and the answer referred to the policy moneys as being part of the balances mentioned in the notice: *Held*, that the notice created a valid security on the insurance money in favour of the bank, being, with the letters, sufficiently definite, and the pendency of the action not creating any objection on the ground of maintenance.¹

The attorneys acting in the prosecution of the action requested the bank, if interested in the result of the pending proceedings, to see that funds were supplied for their prosecution, stating, at the same time, that similar applications had been ineffectually made to the depositors. The bank took no notice of the application, and afterwards a purchaser of the equity of redemption supplied the requisite funds by means of which the insurance money was recovered: *Held*, by the Lord Justice TURNER, confirming the decision below, *dissentiente* Lord Justice KNIGHT BRUCE, that the bank had not lost their priority over the purchaser, and that in order to have produced this result the bank ought at least to have been apprised of the purchase, and of the purchaser's advances.

Held, by both the Lords Justices, that the purchaser was entitled to be repaid all the sums which he had expended in the action, and to be paid his costs of a suit instituted by the bank disputing his title to such repayment.

After an award in the action, the insurance company received notice of an assignment by the plaintiffs of all their property, together with a demand by the assignees for payment of the money recovered in the action. *Semble*, that they were not entitled to file a bill of interpleader, as they might safely have paid the money to the plaintiff's attorneys.²

¹ 1 Story Eq. Jur. § 506 a. To constitute an equitable assignment, no particular form of words is necessary. Any order, writing, or act, which makes an appropriation of a fund amounts to an equitable assignment. Kerr Inj. 99; 3 Lead. Cas. in Eq. (3d Am. ed.) 907 [653].

² Kerr Inj. 125; Desborough v. Harris, 5 De G., M. & G. 439.

THIS was an appeal from an order of Vice-Chancellor STUART, made in two suits.

One was a suit instituted by the Royal Bank of Liverpool, represented by their public officer Mr. Myers, to enforce a charge upon the proceeds of a policy effected by Messrs. Cleland & Day with the United Guarantee and Life Assurance Company, to assure them against any loss which might arise from defect of honesty in Frederick Savil Lee, a person who was about to be employed to conduct their business at Liverpool. The other was an * 113 interpleader suit, instituted by the * guarantee company, for the purpose of determining the rights of various parties in the proceeds of the policy.

It appeared, that at the beginning of 1850, the defendants Cleland & Day, who were carrying on business at Boston, in America, proposed to employ Lee, and that they then effected the policy in question. It was dated 17th January, 1850; and the company thereby undertook, to the extent of 2000*l.*, to make good any loss which might be sustained by Cleland & Day, in consequence of the want of integrity or fidelity of Lee, in the course of his employment by the firm.

Before July, 1850, Messrs. Cleland & Day had, as they alleged, sustained a loss by the dishonesty of Lee. They were then debtors to some other merchants in America, Messrs. Harnden & Co., also carrying on business in Liverpool, their affairs in that town being managed by a Mr. Baines. Being so indebted, Cleland & Day deposited the guarantee policy with Harnden & Co. to secure their debt, and also gave a power of attorney to Dexter Brigham, one of the partners in the firm of Harnden & Co., to receive the money payable upon the policy.

Notice of the deposit was given to the guarantee company, who, however, disputed their liability upon the policy, alleging that the loss which had been sustained had arisen in consequence of Cleland & Day having allowed Lee to conduct their business otherwise than according to the ordinary course of mercantile dealing. Messrs. Harnden & Co. thereupon instructed their attorneys, Messrs. Atkinson & Pilgrim, to commence an action upon the policy, in the name of Cleland & Day, against the guarantee * 114 company, and deposited * the policy with Messrs. Atkinson & Pilgrim for that purpose.

On the 4th of October, 1851, Mr. Baines, who conducted the

business of Messrs. Harnden & Co. at Liverpool, wrote and sent to Messrs. Atkinson & Pilgrim, who then had the policy in their hands, a letter in these terms: "I beg to inform you, that, by virtue of the authority vested in me by D. Brigham, Esq., Jr., of Boston, and Messrs. Harnden & Co. of Liverpool, Boston, and New York, I have transferred to Mr. George Peabody of this city all their interest in a policy for 2000*l.* effected by, &c." [here followed a description of the policy], "and beg you will hold the policy for Mr. Peabody's account, and pay over to him its proceeds."

On the 10th October, 1851, Mr. Peabody wrote to Mr. Baines as follows: "You will be good enough to write to Mr. Brigham and Messrs. Harnden & Co. by to-morrow's steamer, requesting them to send me by return mail the confirmation of your letter to me of the 4th, respecting the transfer of the 2000*l.* guarantee policy. They will be able to judge whether any thing more is necessary to render my title to it perfectly secure, and I rely upon you and themselves seeing that what is requisite for this purpose is done."

On the 15th October, 1851, Mr. Baines wrote an order, addressed to Mr. Peabody, in these terms: "Dear Sir,— You will please to hold at the disposal of the Royal Bank of Liverpool any balances which may be due to us on our account with you, and oblige, dear sir, yours respectively, *per proc.* Harnden & Co. J. BAINES."

This order was given to the bank, and sent by them *to *115 Peabody, in a letter addressed to him by the manager of the bank, as follows:—

"Dear Sir,— Annexed I beg to hand you an order from Messrs. Harnden & Co. to hold at our disposal any balances which may be due to them, and you will oblige by informing us what will be the probable amount."

On the same day Mr. Baines wrote to Mr. Peabody as follows: "We have to-day given the Royal Bank an order on you for any balance which may be due to us in the winding up of our present accounts, which we shall feel obliged if you will confirm. We are, dear sir, yours, &c. You will on receipt of claim from guarantee company have that amount, say 1500*l.* to 2000*l.*, to our

credit, besides the margin in the Grand Junction bonds of about 800*l.* to 1000*l.*”

On the 16th of October, 1851, Mr. Peabody wrote to the bank as follows: “I have received your favour dated yesterday, enclosing an order from Messrs. Harnden & Co., to hold at the disposal of your institution any balances which may be due to them on their account with me. I will comply strictly with the order, but it is impossible for me at present to tell you the probable amount, and I must refer you to Mr. Baines on the subject. The amount will mainly depend on a claim on a guarantee company, and the value of 4000*l.* Grand Junction Railroad bonds.”

On the 24th of March, 1852, Mr. Peabody wrote to Messrs. Harnden & Co. as follows: “On 18th February your Mr. Brigham wrote us, requesting a postponement of the sale of the Grand Junction bonds, as the Royal Bank of Liverpool would probably pay the balance due to us and take charge of all the secu-

* 116 rities we hold. * We have been expecting to hear from the bank or you on the subject. We enclose a statement of our account to 31st December, the amount due in respect of which is but 2098*l.* and interest. We have frequently offered the bonds at 90, but lately effected no sale. If the bank chooses to pay the above amount on Friday next, we will give them an order for 4000*l.* Grand Junction bonds, and transfer to them the claim on the security in the hands of Messrs. Atkinson & Pilgrim.”

Messrs. Atkinson & Pilgrim at this time knew that there was a charge on the policy in favour of the bank, although they did not know the nature or extent of it.

In the mean time the guarantee company had filed their bill against Cleland & Day, insisting that the loss had been sustained by Lee's being employed otherwise than in the regular course of business.

On this bill the company obtained the common injunction, for default of an answer being put in by the defendants Cleland & Day. Considerable delay occurred before their answer could be obtained, and on the 25th of November, 1852, Messrs. Atkinson & Pilgrim wrote to the Royal Bank as follows: “Mr. James Baines having informed us, in reply to our inquiries, that you are interested in the money to be recovered under the policy of the Guarantee and Life Assurance Company for 2000*l.* in favour of Messrs. Cleland & Day, of Boston, U. S., and which they trans-

ferred to Mr. Dexter Brigham, of the firm of Harnden & Co., and as to which an action at law and a suit in equity are now pending, we think it right to apprise you that we wrote Mr. Baines on the 20th August last, in reply to his of the 18th of that month, informing him of the position of the pending proceedings, and that it was necessary we * should be supplied with 200*l.* to * 117 cover disbursements already made and those about to be made, and we presume that he made you acquainted with the contents of our letter. We have written him several times since, and on the 26th ultimo he wrote us that he should on the morrow see Mr. Chaffers, (*a*) when he would report to us what had transpired, since which time Mr. Baines has made no allusion to the subject, although he has written us on other points. In our letter to Mr. Baines of the 20th October last, we mentioned that we had written to Messrs. Harnden & Co. on the 4th June last as to the necessity of supplying us with funds to carry on the proceedings, to which we have received no reply. If you have an interest in the result of the proceedings now pending for recovering the 2000*l.* we advise you to exercise whatever influence you possess in getting the answer of Messrs. Cleland & Day to the bill in Chancery put in as soon as possible, and to see that we are supplied with funds; for, besides the difficulty we encounter in getting an extension of time to put in the answer, the fact of its being so long delayed impresses our opponents with a belief that we have a bad case, whereas we are confidently advised by counsel that there is every probability of the action against the guarantee company being successful. The answer was sent to Boston so long ago as the 4th of June, and ought to have been sworn and returned to us long since."

This letter was not answered, and on the 7th of December, 1852, Messrs. Atkinson & Pilgrim wrote again to the bank as follows: "Gentlemen, — We wrote you on the 25th ult. respecting the proceedings which are now pending and being conducted by us to recover the amount of a guarantee policy which had been transferred * by Messrs. Cleland & Day, of Boston, U. S., * 118 to Mr. Dexter Brigham, on behalf of the firm of Harnden & Co., and we hoped to have been favoured with a reply before this time. We shall feel obliged by an early communication from you on the subject."

(*a*) This gentleman was the manager of the banking company.

This letter also remained unanswered.

The answer was at length put in, and, the injunction being dissolved, the action at law proceeded, and a verdict was given for the plaintiff on the 23d December, 1853, subject to a reference as to the sum to be paid by the defendants.

On the 12th January, 1854, the arbitrator made his award, fixing 2250*l.* as the amount to be recovered under the verdict, and it was this sum which was the subject of dispute in these suits.

The case made in Myers's bill on the part of the bank was that Harnden & Co., being indebted to the defendant George Peabody, charged the sum due from them to him upon their interest in the policy of guarantee. That having made this charge in favour of Peabody they then became debtors to the bank and charged the balance which might be due to them from Peabody with the debt due from them to the bank, and the claim made by the bill rested upon the latter charge.

The case made against the bill was this. It was said, in the first place, that the charge in favour of the bank did not include the proceeds of the policy which Peabody might receive from the guarantee company; and, secondly, that if the bank had any lien they had lost it, for this reason, that when applied to by Atkinson

& Pilgrim to make them advances for carrying on the
 *119 action, they refused or *neglected to make any such advances. It appeared that Messrs. Harnden & Co., by an instrument dated 12th November, 1852, assigned all their property, including their interest in the policy, to trustees for their creditors, and that the trustees sold the policy to Charles S. Brown of Boston, one of the defendants, who gave notice of the assignment by a letter written immediately afterwards, which reached Atkinson & Pilgrim in December, 1852, they having then the policy in their hands. It further appeared that Brown had incurred expenses by making advances to Atkinson & Pilgrim for the action, considerably exceeding the taxed costs recovered against the guarantee company, and this was claimed as a first charge upon the fund recovered.

The case in the interpleader suit was, that on the 28th January, 1854, after the verdict and award, Messrs. Atkinson & Pilgrim wrote a letter to the solicitor of the United Guarantee Company, in which they expressed themselves thus: "We shall be ready to receive the amount of damages named as soon as your clients are

prepared to pay same, and to give our receipt as the plaintiffs' attorneys, which is all your clients can claim, and will be a perfect discharge to them. The creditors of Messrs. Cleland & Day have no claim on the policy whatever." That on the 30th January, 1854, the guarantee company were served with a notice signed by the defendant James Scott, stating, that by a deed dated the 4th December, 1850, Cleland & Day had assigned all their property to James Scott and Dexter Brigham, as trustees for their creditors, and requiring the money recovered in the action to be paid to Scott. On these grounds the guarantee company filed their bill, praying that the defendants Cleland & Day, Scott & Brigham, might interplead.

* Upon the hearing of the two causes the Vice-Chan- * 120 cellor was of opinion that Brown was entitled to the extra costs incurred by him in the action against the United Guarantee Company, but his Honor thought that Brown had no further right or interest, and that, subject to the payment of those costs, the bank was entitled to the proceeds of the policy. The Vice-Chancellor was also of opinion that the costs of all parties to these suits ought to be paid by Brown, and the decree which he made accordingly was, that an inquiry should be made whether any and what sum was due to Brown for the costs of the action beyond the taxed costs recovered against the guarantee company; that the costs of Myers, of the guarantee company, and of Peabody in both of these suits should be taxed; and their directions were given, the effect of which was that these costs should be paid out of the sum of 2250*l.*, and that fund was to be indemnified by Brown, after deducting what the latter was entitled to receive under the first inquiry respecting the costs of the action.

The directions in the decree were somewhat complex, but the above was the result.

From this decree Mr. Brown and Messrs. Cleland & Day appealed.

Mr. Malins, Mr. Cowling, and Mr. Hetherington, in support of the appeal. — First, there was no assignment of the policy, or the money secured by it to the Bank of Liverpool, for there was no reference to this particular credit, nor notice to the trustees. *Powles v. Innes*, (a) *Rodick v. Gandell*. (b) The only refer-

(a) 11 M. & W. 10.

(b) 1 De G., M. & G. 763.

* 121 ence is to "any balances which may be * due." This does not sufficiently designate the policies. To create an equitable mortgage or lien there must be either a writing distinctly creating a security or a deposit. Here there is neither. But in the next place if the bank ever had priority over Mr. Brown or those through whom he claims, they have lost it. For when applied to in 1852, and invited to say whether they had an interest in the policy or not, they made no communication. While there was only expense to be incurred, they said nothing, but when the fund was recovered, they for the first time made their claim.

[THE LORD JUSTICE KNIGHT BRUCE. — Do you put the case on the ground on which *Prendergast v. Turton* (a) was decided by Lord LYNDEHURST?]

We submit that the same principle applies here, and that the circumstance of the property there having been a mine was accidental and not essential.

[THE LORD JUSTICE KNIGHT BRUCE. — In *Norway v. Rowe* (b) Lord ELTON said: "There are persons who will stand by; see the expenditure incurred; if it turns out profitable, set up their claim: if otherwise, have nothing to do with it. It deserves great consideration whether the Court would interpose even by decree, much less on motion."]

Another objection to the claim of Mr. Brown is that it arises from an assignment of the benefit of a pending action, and is, consequently, bad on the ground of champerty or maintenance.

Mr. Bacon and *Mr. Cairns*, for the Royal Bank of Liverpool.

— The letters constitute a sufficiently distinct agreement
* 122 for a lien for the purposes of which no formal * language is requisite, so that the intention is apparent.

[THE LORD JUSTICE TURNER. — Is such an assignment of what is to be recovered in a pending action legal?]

(a) 1 Y. & C. C. C. 98; and 13 Law J. N. S., Ch. 268; S. C. on appeal.

(b) 19 Ves. 144, 159.

It has never been held to be otherwise, nor could it be, consistently with the ordinary transactions of life. It can never be laid down, that because a debtor's property is the subject of litigation, he can give no security upon it. *Prosser v. Edmonds*, (a) *Harrington v. Long*, (b) *Hartley v. Russell*, (c) *Hunter v. Daniel*. (d) Cannot the holder of a bill of exchange give a lien upon it or deal with it in any way, because the acceptor refuses to pay?

As to the omission to contribute to the expenses of the action, could a puisne incumbrancer on real estate say to the first mortgagee, you must bring ejectment or I will, and you shall lose your security? *Prendergast v. Turton* was the case of a mine, which has always been held to differ from other property. Moreover, there had been neglect and default there in the fulfilment of a clear duty. The defaulter sought relief in equity against the consequences of his default, and in the case of precarious property like a mine the Court held him not entitled to be so relieved. A mortgagee has no duty imposed upon him of recovering the subject of the security. He may say to the puisne incumbrancer, "I will not contribute to the expense of the proceeding, but if it succeeds, I am entitled to the benefit of it." Moreover, in this case Brown gave no notice of his interest. The bank did not know that he was finding funds, nor, consequently, that any equity against them was intended to be founded on that circumstance. They did not know of any puisne mortgagee.

* As to the interpleader suit, this was not a case for interpleader, and the company ought to pay the costs of it. * 123

[THE LORD JUSTICE KNIGHT BRUCE. — Can a debtor, against whom judgment has been recovered at law, file a bill of interpleader on the ground of equitable claims upon it?]

It has never been so held. The rule is, that the plaintiff's attorneys can give a good discharge for what is recovered in an action.

Mr. Smythe, for Scott. — The costs of an interpleader suit do not

(a) 1 Y. & C. 499.

(b) 2 Myl. & K. 590.

(c) 2 Sim. & St. 244.

(d) 4 Hare, 420.

necessarily follow the result of the suit, but are in the discretion of the Court. *Cowtan v. Williams*, (a) *Meux v. Bell*. (b)

Mr. Freeling, for the guarantee company. — He contended that the interpleader suit was properly instituted, and that it could not at all events be objected to when the parties had taken advantage of it for the decision of their rights. The decree was therefore right in giving the plaintiffs in that suit their costs. He referred to *Hamilton v. Marks*. (c)

The Lord Justice TURNER, after stating the facts of the case nearly in the words of the statement above given, said: I think that no doubt arises as to the validity of the security upon the policy in favour of Harnden & Co.

The first question will be, whether a good charge upon it was created in favour of Peabody. In my opinion there was. [His Lordship referred to the letter of the 4th of October, * 124 1851.] This, therefore, was a * plain direction to the holders of the policy to pay the proceeds to Peabody. But then it was put in a very ingenious argument by *Mr. Cowling*, that Peabody did not accept the charge upon the policy, having other securities upon American bonds more than sufficient to cover his debt. It was said that, in a letter written on the 10th October, 1851, Peabody required confirmation from Harnden & Co. for the charge made by Baines; and that in all the subsequent correspondence Peabody referred to the security on the American bonds, but took no notice of the policy. But I find that in a letter of the 24th March, 1852, he refers to the policy as an existing security. I think it clear, therefore, that he had accepted the charge upon the policy created by Baines's letter, and have no doubt that a good charge was created by Harnden & Co. in favour of Peabody.

The next question is, whether there was a valid charge in favour of the bank upon the balance in Peabody's account; and, if so, whether this charge included the policy. I am of opinion that there was such a charge, and that it included the policy. [His Lordship read the letter of the 15th October, 1851.] This was accompanied by a letter from the manager of the bank to Peabody, requesting to know the probable amount of the balance. The ex-

(a) 9 Ves. 107. (b) 1 Hare, 73, 98. (c) 5 De G. & Sim. 638.

pression "any balances which may be due to us on your account" is certainly an equivocal expression, and does not clearly relate to the proceeds of the policy; but by another letter of Baines to Peabody of the same date, which is stated in Peabody's answer, Baines expressed himself more distinctly upon the subject of the property to which the charge applied. [His Lordship read it.] And in Peabody's answer to the bank, dated 15th October, 1851, he says that the amount of the balance would mainly depend on a claim upon a guarantee company and the value of 4000*l.* Grand Junction Railway * bonds. These letters amount to a direction by a * 125 debtor that, subject to his charge, his creditor is to hold the fund upon which his debt is secured to the credit of a third person, and an agreement by the creditor so to hold it. At the same time Atkinson & Pilgrim, the actual holders of the security, had notice of the charge, though not of the nature or extent of it. I conclude, therefore, that a good charge was created in favour of the bank.

The question then is, whether this lien has been lost. In the action upon the policy, Messrs. Atkinson & Pilgrim were originally instructed by Dexter Brigham, and great expenses were incurred by them in the prosecution of it, to meet which they only received 100*l.* from Brigham. They wrote without success to Harnden & Co. in America, and to Baines in Liverpool, soliciting further advances to carry on the action and to defend the suit instituted by the guarantee company, the answer in which had been sent to America, but not returned. Under these circumstances Messrs. Atkinson & Pilgrim, on the 25th November, 1852, wrote a letter to the directors of the bank in the following terms: [His Lordship read it.]

This letter was not answered. On the 7th of December, 1852, Messrs. Atkinson & Pilgrim again wrote to the bank, requesting an answer to their communication, and still no answer was returned. Now it is said that this conduct on the part of the bank is itself sufficient to entitle Mr. Brown, to whom the fund has been assigned by the trustees for Messrs. Harnden & Co.'s creditors, to priority over the bank. Upon this point I have the misfortune to differ from my learned brother. I think that this conduct is not in itself enough to postpone the right of the bank. I think that, to defeat the * prior charge of the bank, it ought to be * 126 shown that they had clear and distinct notice of the inten-

tion of creating a new charge if the bank did not advance the necessary funds for recovering the sum due upon the policy. The letter which has been relied upon does not convey such an intention. It rather urges the bank to interfere with Harnden & Co. to get in the answer and supply the funds, than calls upon them to do any thing themselves. I think it would be unsafe to hold, that such a letter, written by a mortgagor's solicitor to a mortgagee, would operate to postpone his rights to those of a subsequent incumbrancer. I say this with great diffidence; but I am the less inclined to give to the letter, in the present case, the operation contended for, when I find that Brown took the assignment without making any inquiries as to prior rights.

But, on the other hand, it is clear that justice requires that the bank should not have the benefit of Brown's expenditure without indemnifying him. I think, indeed, that the decree in this respect does not exceed, but falls short of, what justice to that gentleman requires.

Besides the action, there was a suit in equity against Cleland & Day to restrain the proceedings in the action, and it is probable that money was advanced by Brown to procure the answer to be put in by the defendants in that suit. I think the decree should be extended so as to cover the costs of that suit as well as those of the action, and that Brown is entitled to interest at 4l. per cent upon his advances. My opinion therefore is, that the bank is entitled to priority over the fund, but that they ought to pay Brown his advances both for the action and suit, with interest.

* 127 But there my agreement with the Vice-Chancellor * stops.

As to the costs of these suits, I cannot concur in his decision. He has been of opinion that the costs of all parties ought to be paid by Brown. Now it was by means of his advances that the fund was realized, and I do not think it fair that all the costs of determining the title to it should be thrown upon him. On the contrary, I think that the bank ought to pay Brown his costs: first, because he took the fund without notice of the lien of the bank; and, secondly, because the bank never offered, without suit, to indemnify him in respect of those advances which I have held he was entitled to be repaid. I think also that Peabody's costs should be paid by the bank; since, under the circumstances, that gentleman became a trustee of the fund for them. The same

principle applies to the costs of the guarantee company, who in this suit must be considered as trustees, since, whatever their conduct may have been before, there is nothing to impeach it as far as these proceedings are concerned.

With respect to the costs of the interpleader suit, I very much doubt whether this was properly a case for interpleader, since I think the money might have been safely paid to Messrs. Atkinson & Pilgrim, as the attorneys in the action. The money was, however, paid into Court, and the suit may be said to have been adopted by all parties, and it is now too late to take that objection. I think, therefore, the plaintiffs in that suit should have their costs.¹

These costs would primarily and under ordinary circumstances, if the interpleader were unconnected with the other suit, fall upon the defendant Scott, whose notice, given, as it has appeared, without sufficient foundation, caused the suit. But the bank having adopted the fund in the interpleader suit, these costs should, I think, *under the circumstances, be paid out * 128 of the fund. I think also that Brown, being a party to the appeal, and being, as I consider, entitled to be indemnified to the full extent I have mentioned, the appellants' costs of the appeal should be paid out of the fund. The other costs of the appeal will be costs in the several suits.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, if my learned brother had agreed wholly with the decree under appeal, its affirmance would of course have been the consequence, whatever my opinion may be or might have been. It happens, however, that he agrees with the decree in part only, differing as to the residue. Now so far as he differs from the decree I agree with him. But so far as he agrees with it, I respectfully differ in the main, if not wholly, from him and from the Vice-Chancellor, my opinion being favourable to the title of Mr. Brown, as excluding or preferable to the title or alleged title of the Royal Bank of Liverpool, if not on the construction of the documents, at least on the conduct of Mr. Brown and on that of the Royal Bank of Liverpool. In this state of things we felt, or at least I felt, some doubt whether it was not necessary that we should ask the Lord

¹ Kerr Inj. 131.

Chancellor to hear the case, either with us or alone. But we have come to the conclusion that in this particular instance, without laying down any general rule, we may with propriety dispose of appeal as my learned brother proposes, for the reason already given, that so far as he does not agree with the decree I agree with him (that is to say, I agree that the decree should be altered in the respects and manner that he proposes, though I happen not to think as he does, that it should not be altered more), and for the reason also that we agree together as to the costs of the appeal.

* 129

* PEACOCK *v.* STOCKFORD.

1855. April 27. May 4. Before the LORDS JUSTICES.

A testator bequeathed life-interests in four distinct funds to four nieces respectively, and directed that upon the decease of any or either of them, the principal of the fund to the interest of which such niece was entitled should be held in trust for the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of the testator's other nieces thereinbefore named in equal shares. One of the nieces died leaving two children, and then another niece died without having had a child: *Held*, upon the construction of the whole will, that the children of the former niece were entitled to participate in the fund of which the latter had been tenant for life.

THIS was an appeal from the decision of Vice-Chancellor KIDDERLEY of a question arising upon the construction of a will, another question on which was the subject of a former appeal, reported *ante*, Vol. III., (a) where the material parts of the will are set out and the material facts to the date of that report are stated.

Since that time another of the testator's nieces, Sarah Stockford, had died without having had a child, and the question now was, who upon her death became entitled to the funds, to the income of which she had been entitled for her life.

The Vice-Chancellor decided that these funds became distributable among the children of Ann Burnett (the only surviving niece of the testator who had had any child), and that the children of

Ann Mann (who had died in the lifetime of Sarah Stockford) were not entitled to participate in the fund.

These children appealed from the decision.

Mr. Rolt and *Mr. Giffard*, in support of the appeal.

Mr. Teed, *Mr. Baily*, *Mr. J. V. Prior*, and *Mr. W. D. Evans* were for the several respondents.

Judgment reserved.

*THE LORD JUSTICE KNIGHT BRUCE.—The will before us *130 in this case must of course be read and construed, as it would have been immediately after the testator's death, and, in doing so, a material question seems to me to be, whether, upon the whole contents of the will taken together, there is an intention apparent, that if any child, in existence at the testator's death, or coming into existence afterwards, of any one of the testator's four nieces, should attain majority, not any portion of the capital of the funds the subject of present consideration should fall into the residue.

I think that intention apparent on the instrument. If so, the will must be interpreted accordingly, — must be interpreted so as that if the four nieces having successively died after the testator, three of the four had died without leaving issue, and without having had a child who had lived to attain majority or to marry, and the other of the nieces had died, the first of the four, and had left children who attained majority, those children would have taken the whole of the funds, nor do I think the words very difficult to manage.

The consequence necessarily is, that I must hold that, in the events which have happened, the respondents have not the exclusive title which they assert, and that the petition here is well founded.

THE LORD JUSTICE TURNER.—The question in this case arises upon the will of Thomas Slaughter, and it is this, whether upon the death of Sarah Stockford, a legatee for life under the will, the children of Ann Mann, who predeceased her, became entitled to share in the principal sum in which she took a life-interest.

* 131 Thomas Slaughter, the testator, * had four nieces, Sarah Stockford, Elizabeth Edmonds, Ann Mann, and Ann Burnett.

[His Lordship read the material portions of the will, which are set out *ante*, Vol. III., pp. 73, 74.]

The testator died in 1823, and Mary Slaughter has been long dead. Ann Mann died in 1852. She left two children, and the three other nieces surviving her, and there were then two children (both of whom are still living) of Ann Burnett, one of the nieces; but there was not then, nor has there since been, any child of either of the other two nieces, Sarah Stockford and Elizabeth Edmonds.

Upon the death of Ann Mann a question arose, as to who was entitled to the principal sum in which she took a life-interest, and, this question having been brought before us, we held that that principal sum belonged to the children of Ann Mann and Ann Burnett.

Sarah Stockford has now died leaving no child, and the question before us is, who is entitled to the principal sum, to the income of which she was entitled for life. Vice-Chancellor KINDERSLEY has been of opinion, that this principal sum belongs wholly to the children of Ann Burnett, and the appeal is from his decision.

This question differs entirely from that which arose upon the death of Ann Mann. She was survived by the three other nieces, and by the two children of Ann Burnett, and the sole question we had then to determine was, whether the surviving nieces, or the children of Ann Burnett, were entitled to share with the children of Ann Mann. We held that the children of Ann Burnett were so entitled; but the question now is, whether the

* 132 * children of Ann Mann, the niece who did not survive

Sarah Stockford, are entitled to share with the children of Ann Burnett, the niece who did survive her. The Vice-Chancellor KINDERSLEY has held, that the children of Ann Mann are not so entitled, but that the principal sum in which Sarah Stockford took a life-interest belongs wholly to the children of Ann Burnett.

I am sorry to differ from the Vice-Chancellor's conclusion, but, after repeatedly considering this will, the opinion at which I have arrived is, that, even taking the words "survivors or survivor," to be used in their ordinary sense, the children of Ann Mann are entitled to share with the children of Ann Burnett in this principal

sum. The clause in the will upon which this question arises is different from the common and ordinary clause of survivorship. The trust is not for the survivors or survivor, or for the children of the survivors or survivor, but for the benefit of the child or children of her or them so dying, and of the survivors or survivor. We have here to consider, therefore, not merely to whom do the words "the survivors or survivor" refer, but who are meant by the words "the child or children of her or them so dying." For this we must look to the context. Now the clause commences thus, "And upon the decease of any or either of my said nieces." What is the meaning of the words "any or either" as here used? Do they not import one or more than one? It cannot be doubted that they include one, and I think they as clearly include also more than one; for, throughout the clause, we find the expression "her or them" used as opposite to the words "any or either." I take, therefore, the words "any or either," as used in the introduction of the clause, to have the same meaning as the words "any one or more," and, attributing this meaning to those words, the same meaning must of course be ascribed to the words "her * or them" as used throughout the clause, and then * 133 the true reading of the will is this, that, upon the death of any one or more of the nieces, the principal sum or sums shall be in trust for the child or children of the one or more so dying, and of the survivors or survivor of the other nieces. In other words, upon the death of one of the nieces, the principal sum shall go to the children of her, and of the survivors or survivor of the nieces, and upon the death of more than one of the nieces, the principal sums shall go to the children of them, and of such survivors or survivor.

This, in my opinion, is the true construction of this will, and it is favoured by what was pointed out during the argument, that, upon the construction which has been adopted by the Vice-Chancellor, the principal sum given to the surviving niece for life would fall into the residue if she had no child, a result which seems hardly conformable to the intentions of this testator, who has set apart the whole of these funds as a provision for his nieces and their children.

I think, therefore, that the order must be varied so as to include the children of Ann Mann.

1855. March 28. April 21, 25. May 28. Before the LORDS JUSTICES.

A tenant for life in possession of settled estates, with power to charge them with a principal sum and interest for his own benefit, exercised the power and mortgaged the principal and interest thus charged, together with property of his own, for a larger amount than that of the charge, and kept down the interest on the whole mortgage moneys. The rents and profits of the settled estates were insufficient to pay the interest of the sum charged under the power: *Held*, after the death of the tenant for life, that his mortgagees were entitled to a charge on the inheritance for the deficiency.² *Held*, also, that in taking the account of the rents and profits received by him, they ought not, without special grounds, to be charged with what he might have received but for wilful default.³

THIS was an appeal from the decision of the Master of the Rolls, reported in the 19th volume of Mr. Beavan's Reports, (a) and, by arrangement, the decree came on to be reheard at the same time.

The bill was filed by Lord Kensington for the purpose of redeeming a charge of 20,000*l.* on the Kensington estate, comprised in the settlement made on his marriage. The charge thus sought to be redeemed was created under a power contained in the settlement.

At the date of the settlement, the late Lord Kensington was seised in fee of the Kensington estate, subject to a mortgage to Lord Braybrooke and others, for 60,000*l.*, and that sum of 60,000*l.* was also secured on the Lambister Rectory and tithes, and other estates belonging to the late Lord Kensington.

By the settlement which was dated the 10th of October, 1833, the Kensington estate was settled, subject to the mortgage of 60,000*l.* and interest, to the use of the late lord for life, with remainder to the use of the present lord for life, with remainders to the use of his first and other sons in tail, and with an ultimate limitation to the use of the late Lord Kensington in fee. The settlement contained a power to the late Lord Kensington

(a) Page 50.

¹ S. C., 7 H. L. Cas. 556.

² See Hill Trustees (3d Am. ed.), 586, n. (1).

³ See *Sherwin v. Shakspear*, 5 De G., M. & G. 517; *Sugden v. P.* (14th Eng. ed.) 645.

* to charge the settled estates with any sum not exceeding * 135 20,000*l.*, and interest not exceeding 5*l.* per cent per annum, for the use of himself, his executors, administrators, and assigns, and to create a term to secure the amount thus made chargeable.

It also contained the following proviso: "Provided always, and it is hereby agreed and declared, between and by the said parties to these presents, that in case the said principal sum of 20,000*l.* so charged upon the hereditaments and premises aforesaid, or any part thereof, shall not, at the time of the decease of the said William Lord Kensington, have been raised by a mortgage or mortgages of the said hereditaments or premises charged therewith, and comprised in the said term of 1500 years or otherwise upon the security of the same premises, then, that no further or greater part of the said sum of 20,000*l.*, than as shall have been raised by such mortgage or mortgages, or security as aforesaid, shall be raised or paid, but that as between the personal representatives of the said William Lord Kensington and the person or persons claiming under the limitations of the said indenture of release and settlement, of the 10th day of October, 1833, subject to the same term of 1500 years, the residue of the same principal sum of 20,000*l.* shall sink and not be raisable unless the said William Lord Kensington shall, by any writing under his hand, or by his will and testament, or any codicil or codicils thereto, otherwise expressly direct."

By an indenture dated the 4th day of February, 1835, and made between the late Lord Kensington of the one part, and Henry Whittaker of the other part, Lord Kensington exercised the power by charging the settled estates with 20,000*l.* and interest at 5*l.* per cent per annum, and appointed the estate to Henry Whittaker for * a term of 1500 years, upon trust for raising the * 136 sum charged in such manner as the late Lord Kensington should direct.

By a deed dated the 5th of February, 1835, the late Lord Kensington assigned the 20,000*l.* and interest, charged by the indenture of the 4th of February, 1835, and Whittaker assigned the 1500 years' term created by that indenture, and the late Lord Kensington also conveyed the Lambister Rectory and tithes, to Frederick W. Roke by way of mortgage for securing the sum of 5500*l.*, and by another deed dated the 24th of June, 1835, the late Lord Kensington charged the premises comprised in the deed of the 5th

of February, 1835, with the further sum of 2500*l.* in favour of Roke.

A further assignment of the 20,000*l.* and interest, and the 1500 years' term, was afterwards made by a deed dated the 9th of September, 1836, made by the late Lord Kensington and Henry Whittaker to Henry Luard and William Gunston, by way of mortgage for securing the sum of 1000*l.* and interest, and by a subsequent deed dated the 25th of July, 1837, the late Lord Kensington charged the 20,000*l.* and interest, and other property to which he was entitled, with the sum of 5277*l.* 6*s.* 2*d.* in favour of Henry Whittaker the trustee and Joseph Tatham.

By three several deeds, dated the 12th, 14th, and 30th of April, 1838, the several sums secured by the three last-mentioned indentures, and all the securities for the same, were assigned to Lord Braybrooke and others, the mortgagees, for 60,000*l.*, who thus became entitled to the sum of 14,277*l.* 6*s.* 2*d.* charged upon the 20,000*l.* and interest.

* 137 * The late Lord Kensington afterwards by a deed, dated the 27th of January, 1842, assigned the 20,000*l.* and interest, and the benefit in equity of the 1500 years' term created for securing the same, with other property belonging to him, to the defendants Edward Bouverie, the Bishop of Bath and Wells, and Philip Pleydell Bouverie, by way of mortgage for securing to them the sum of 24,500*l.* and interest, subject as to the 20,000*l.* and interest, and to the prior charges thereon for the sum of 14,277*l.* 6*s.* 2*d.*; and the proviso for quiet enjoyment until default, which was contained in this deed, extended to the quiet enjoyment by the late Lord Kensington of the interest on the 20,000*l.*

A general arrangement of the affairs of the late Lord Kensington appeared to have been at this time made. By other deeds, dated the same 27th of January, 1842, his other estates were mortgaged as to part in favour of P. P. Bouverie and Charles Tenant, for securing the sum of 32,500*l.*, and as to other part in favour of Frederick William Roke, for securing the sum of 30,000*l.* The several properties comprised in the several deeds of the 27th of January, 1842, were respectively made liable for the sums secured by the other deeds of even date; and by a further deed, dated the same 27th of January, 1842, the late Lord Kensington, and all the mortgagees, concurred in appointing Richard Harrison to be the receiver of the rents of the estates comprised in the

several mortgages, with directions to apply the rents according to the rights of the several mortgagees.

The late Lord Kensington died on the 10th of August, 1852. The bill in this suit was filed by the present Lord Kensington, to redeem the equity of redemption in the settled estate, subject to the first mortgage (which the mortgagees were willing to permit to remain undisturbed). * The decree, which was * 138 now reheard, was pronounced on the 1st of March, 1854.

It was prefaced by a statement, that the mortgagees for 60,000*l.* at the bar, by their counsel, consented not to be redeemed, and to allow that sum to remain a charge upon the property, and it directed an account and inquiry as to what was due, and to whom, for principal and interest upon the 20,000*l.* charged under the power and for costs, and it then proceeded in the usual terms of a decree for redemption.

Under this decree the chief clerk had taken an account of the interest on the 20,000*l.*, only from the death of the late Lord Kensington, who had remained in possession till his decease. The rents and profits were found to be sufficient to keep down the interest on the 60,000*l.*, but not to pay the 5*l.* per cent on the 20,000*l.* also, and the case then came before the Master of the Rolls upon an adjourned summons, with a view to obtain an inquiry as to the excess of interest of the 20,000*l.* over the balance of rents and profits after payment of interest on the 60,000*l.* during the life of the late lord, and to have that excess charged on the inheritance as part of the mortgage security given to the appellants.

The Master of the Rolls refused the account and inquiry thus sought, expressing an opinion, that the death of the tenant for life had concluded all account of the rents and profits of this estate received by him, as between him and the persons entitled to that estate in remainder on both sides. His Honor was of opinion, (a) that if the interest had been allowed to run into arrear, the present Lord Kensington, who (in that event, and if the defendants the mortgagees had not taken possession) might have obtained a receiver, could not now ask for any account of the rents received by the late Lord Kensington, * or go against his * 139 assets for that purpose, and also, that in like manner no

(a) See 19 Beav. 55.

person claiming under the late Lord Kensington could now come forward and ask for such an account, for the purpose of showing that the rents of the mortgaged estate were insufficient for the purpose of keeping down the interest on the charge, and of requiring that such deficiency of rent should constitute a charge on the estate against the person entitled to it in remainder. But his Honor was further of opinion, that under the terms of the decree, it was not open to the defendants to raise this question, and that a special inquiry and account ought to have been directed by the decree, had it been the intention of the Court to institute such an inquiry. (a)

Mr. Lloyd and Mr. Shapter, for the mortgagees. — The power contained in the settlement, in terms, authorized the interest to be charged with the principal for the use of the late Lord Kensington, his executors, administrators, and assigns, and the term was to be created for the purpose of raising the principal and interest. Upon the true construction of the settlement the late lord had, as against the parties entitled in remainder, a right to charge the estate with the 20,000*l.*, and the interest upon it, from the date of the charge. He exercised that power by charging the settled property with the principal and interest, and so far as the interest has not been paid it remains a charge. As tenant for life Lord Kensington was bound, it is true, to keep down the interest on the charge so far as the rents and profits extended, but no further, and to that extent and no further can the interest be considered as having been paid. The Master of the Rolls considered that Lord Kensington had paid in fact the interest on the

* 140 charge. This, however, we submit was not the case. * All that he did was to pay the interest on his own mortgage. But if he had done so it would make no difference, for a tenant for life paying a charge on the inheritance is not presumed to intend exoneration; nor could the intention be here material, for the creation of the charge of 20,000*l.* and interest was followed very shortly by the mortgage of both principal and interest, and no subsequent act or intention on the part of the mortgagor could affect the mortgagees.

(a) See 19 Beav. 56.

They referred to *Earl of Clarendon v. Barham*, (a) *Byam v. Sutton*, (b) *Tracy v. Lady Hereford*, (c) *Penrhyn v. Hughes*, (d) *Caulfield v. Maguire*, (e) *Howell v. Howell*, (g) *Sherwin v. Shakspear*, (h) *Whitbread v. Smith*. (i)

The Solicitor-General, Mr. Roundell Palmer, and *Mr. Selwyn*, for the plaintiff. — This claim for reimbursement is not made by the late lord or his representatives, but by incumbrancers deriving title from him, who, having been paid in full their interest by the tenant for life, now seek to recover it over again, without showing the smallest evidence of intention on the part of the late lord to keep up any charge in respect of the interest paid by him. The true position of the case is this. The late Lord Kensington, having the power in question, exercised it by charging the estate. To obtain the means of raising the amount charged, he created a term which he assigned to trustees. The trustees borrowed various sums, which were ultimately collected together in the hands of the appellants. No charge in respect of interest on the 20,000*l.* could arise during the lifetime of the late Lord Kensington, unless * the rents were insufficient. If he had intended to * 141 set up and assign a charge in respect of any alleged insufficiency, the assignments would have recited that the rents were insufficient, and that he had advanced the deficiency out of his own moneys, and meant to claim the amount of the advance as a charge on the estate. But the appellants' own title-deed does not purport or indicate any intention to assign the benefit of any such claim, or even to set it up. There was, therefore, no contract, nor any intention on the part of the late Lord Kensington to create this charge. But if there had been, where is the authority for the proposition, that a tenant for life, paying interest on an incumbrance, is entitled to a charge on the inheritance? *Caulfield v. Maguire* (e) is no such authority.

[THE LORD JUSTICE TURNER. — Upon whom is the burden of proving with what intention the tenant for life paid the excess of the interest on the incumbrance over the income of the estate?]

(a) 1 Y. & C. C. C. 688.

(b) 18 Jur. 847.

(c) 2 Bro. C. C. 128.

(d) 5 Ves. 99.

(e) 2 Jo. & Lat. 141.

(g) 2 Myl. & Cr. 478.

(h) 5 De G., M. & G. 517.

(i) 3 De G., M. & G. 741.

Upon those who claim under him. The case is the reverse of payment in respect of the capital of the incumbrance, for it is *primâ facie* the duty of the tenant for life to keep down the interest on incumbrances, but it is not his duty *primâ facie* to pay off any part of the capital. The books would not be without a trace of authority in favour of such a claim as is now set up on behalf of persons claiming under a tenant for life who has taken upon himself to pay in respect of interest on an incumbrance more than he received, if such a claim were well founded; *Jones v. Morgan (a)* is an authority to the contrary. There Lord THURLOW said: "He paid interest much beyond what the profits of the estate would have discharged, which is a demonstration, *primâ facie*, that, though tenant for life, he meant to discharge the estate." It would

be a course most unjust to the remainder-man to allow the * 142 tenant for life, without giving the remainder-man * notice of any alleged deficiency of rents, to make up such alleged deficiency, and to have a charge for the amount on the inheritance. For if the tenant for life did not keep down the interest on the charge, the remainder-man would be entitled to have a receiver appointed, and the tenant for life, by paying the alleged deficiency, excludes this right. Ought he to be deprived of it, and yet have to pay the surplus interest? The moment that the rents and profits are alleged to fall short of the interest on the incumbrances, the remainder-man has an interest in the amount of the rents and profits, and in the letting and general management of the estate, and the tenant for life cannot charge him with the deficiency without his having an opportunity of seeing whether the utmost has been made of the income of the estate. Otherwise the tenant for life might lay part of the estate, which might be profitable, to his park or his warren, or might from benevolent or political motives remit rents, and in many other ways deal with the income in a manner subject to question. His duty, therefore, is, if he means to make his keeping down the interest on the incumbrances a matter of future claim, to apprise the remainder-man of that fact; or else his proper course is not to interfere, but to allow the incumbrancers to take their ordinary remedies, and those remedies would protect the rights of the persons entitled in remainder. A man cannot have the double right of a tenant for

(a) 1 Bro. C. C. 218.

life and a mortgagee. He cannot be at liberty to manage the estate at his own will, making as much or as little of it as he pleases, and yet charge the inheritance with a deficiency, which those interested in it might have found the means of obviating. At all events, if there is to be an account, it must be taken against the defendants, not only of the rents which the late Lord Kensington received, but of those which, without his wilful default he might have received, and the period must be limited * with reference to the Statute of Limitations, otherwise * 143 the tenant for life would be in a better position than a mortgagee.

Mr. Freeling, Mr. Southgate, and Mr. Micklethwaite, appeared for other parties.

Mr. Lloyd, in reply.

He questioned the accuracy of the report of *Jones v. Morgan*, and, on the question of the Statute of Limitations, referred to *Burrell v. Lord Egremont*, (a) and *Cox v. Dolman*. (b)

May 28.

THE LORD JUSTICE KNIGHT BRUCE. — This matter when it first came before us was one merely of appeal from an interlocutory order made by his Honor the Master of the Rolls, confirming or declining to disturb a certificate of his chief clerk, made under the decree in the cause. But after the commencement of the argument it was with our assent agreed at the bar, that we should proceed as if, in addition to the appeal motion, the decree itself were before us, under a petition of rehearing, and accordingly capable of being varied by us in the way of addition or otherwise, so far at least as concerns the main or only point in contest, the question, namely, whether any and what, if any, amount of interest on the 20,000*l.* charged in 1835, on certain lands in Middlesex, by the late Lord Kensington, under a power given or reserved to him in 1833, was or is claimable against the present Lord Kensington the plaintiff, in respect of time anterior to the late lord's death.

(a) 7 Beav. 205.

(b) 2 De G., M. & G. 592.

The progress and continuance of the argument having
 * 144 * been on this footing, and such being the basis on which
 we are now to decide, it is obvious that we have here materials and means which the Master of the Rolls when he made the order originally appealed from had not.

In considering the whole contention, it has seemed to me that, by a portion (I do not say all) of the propositions advanced on the part of the plaintiff, some among the principles and rules of the law of property in this country, which I had thought long settled, and which I still think thoroughly established, and (unless perhaps in the present cause) of universal recognition, have been endeavoured to be brought into dispute.

In the simple and not extraordinary case of an owner of land in fee mortgaging the fee, then devising the equity of redemption to A. for life, with remainder to B. for life or absolutely, and dying in possession, and A. immediately afterwards, as tenant for life, entering into possession, and subsequently paying off and taking a transfer to a trustee for himself of the mortgage, few lawyers or none can be unaware of the nature or condition of the respective rights of A. and B. Of course the character of A.'s possession is not changed. Of course he is not turned into a mortgagee in possession. Of course he has the same claim and title against the estate with regard to principal, and with regard to interest, as the original mortgagee would have had if no transfer had taken place. Of course A. has all the rights of a mortgagee of the estate as well as all the rights of a tenant for life of the equity of redemption, but, of course also, A. is bound to perform all those duties towards B., with respect to the mortgage, which would have been incumbent on A., as between them, if the mortgage had continued in the hands of the original mortgagee. Nor can A. while

* 145 living, or his personal * representative after his death, be heard in a Court of Equity, to say, at once, that the mortgage is in force, and that those duties, having been unperformed, are to remain so. It is, I apprehend, however, as clearly incontrovertible that, thus subject, A. while living, or his personal representative, may be entitled to charge the fee with interest, for a period, even of years prior to A.'s death,—not merely with interest which accrued due before the transfer, but with interest in respect of time during A.'s life after the transfer. And in truth, the only point here of any the least difficulty, as I think, is the question,

whether the case, that I have been suggesting between A. and B., is solidly, is substantially distinguishable, is distinguishable not merely in accidentals, from the case before us, between the late Lord Kensington and the persons claiming title under him to the sum of 20,000*l.* charged by the deed of 4th of February, 1835, and its interest on one hand, and the present Lord Kensington, the plaintiff, on the other; and I am of opinion, that one of the two cases is not solidly, — is not substantially, — is not otherwise, than merely in accidentals, distinguishable from the other.

The late Lord Kensington — having, by the charging deed of the 4th of February, 1835, fully executed, without exceeding the power of charging the Middlesex estates, settled in 1853, on the marriage of his son, the plaintiff, which the late lord then reserved to himself — became an incumbrancer on those estates for the 20,000*l.* charged and interest, according to the tenor of the charging deed of the 4th of February, 1835; that is to say, interest on the 20,000*l.* at the rate of 5*l.* per cent per annum, from the 4th of February, 1835. The language (perhaps, not perfectly appropriate) of the trust declared by the deed of the term which it purported to create seems to me immaterial; nor is it material, I think, that the deed contains * a clause in these * 146 words: [His Lordship read the proviso set out *ante*, p. 135.]

This clause I consider unimportant, because, within the meaning of it (as I understand the instruments and the facts before us) the 20,000*l.* had been at the time of the late Lord Kensington's death raised by such a mortgage or mortgages, or upon such security as the clause refers to. The clause, therefore (whether aptly or otherwise expressed), is, I conceive, for every present purpose to be disregarded. I acknowledge, however, that I had, for some time, doubted as to its effect upon part at least of the interest prior to the 27th of January, 1842, the day on or before which the whole 20,000*l.* must, I conceive, be taken to have been raised within the meaning of the clause. My opinion, however, at present, I repeat, is, that in or before the year 1842 the clause became inoperative, and that interest must be calculated on the whole 20,000*l.* as if the clause had not existed.

The estates thus charged by the late Lord Kensington were and are, as between himself and all others claiming under the settlement of 1833, the first or only fund for paying both the principal

and the interest of the 20,000*l.* according to the tenor of the charging deed ; and that he assigned to creditors of his own, or caused to be vested in them, the 20,000*l.* and the interest, is not a circumstance that can relieve those estates or avail or assist the plaintiff. It is said by the creditors, or some of them, and by the executor of the late Lord Kensington, that arrears of interest on the 20,000*l.* were due at his death, which must now be paid by his successor, the present lord, or out of the estates charged ; and as this may possibly be true, and the correctness of the assertion in point of fact is denied or not admitted by the present lord

* 147 (the plaintiff), it must be, in some mode I conceive, * ascertained. For the plaintiff's allegation of the impossibility of the correctness of this claim in point of right appears to me, I repeat, one that cannot be maintained, either on the construction of the instruments or otherwise.

The creditors do not, nor does the executor, pretend that, in taking the account, the obligations of a tenant for life of an incumbered estate, as between him and the remainder-man, in respect of the interest on the incumbrances, are to be disregarded ; but it seems to me plain that if, with due regard to those obligations, the rents properly (as between the tenant for life and the remainder-man) applicable to the payment of the interest on the 20,000*l.* were insufficient to keep it down, the interest remaining thus unsatisfied at the late lord's death must be paid by the plaintiff or out of the estates. The circumstance (if true) that the late lord kept down the whole or part of the interest payable by him to his creditors, or some of them (that is to say, to the incumbrancers under him on the 20,000*l.*, or to some of them), or that, otherwise, little or no interest was, as between him and them in arrear to them at his death, seems to me unimportant for present purposes ; the materials before the court affording no ground of belief that, by way of gift to the present Lord Kensington or otherwise, the late lord, or any of his creditors or incumbrancers, intended to waive or relinquish any right that the late lord had available against the estates ; which I say, without giving any weight, against the plaintiff, to the fact (however true) that the interest of the 20,000*l.* formed part of the security to the creditors or incumbrancers for their principal as well as their interest. The deed, appointing Mr. Harrison to be receiver, and all the circumstances in evidence, show, I think, that for all the pur-

poses, and in every sense, material in this cause, * the late * 148 Lord Kensington must be considered as having been continually in possession of the estates from a period preceding the year 1835 down to his death. But that possession, commencing and continuing when and as it did, must of course be referred to his character of tenant for life, and cannot be treated as the possession of an incumbrancer in the character of an incumbrancer. "Wilful default," therefore, as to any time during his life, is out of the case, there not being any special ground laid, either in proof or in allegation, for any such direction. I repeat that the Court, in my opinion, is bound to inform itself whether there is interest due on the 20,000*l.* in respect of time anterior to the late Lord Kensington's decease. The amount, which will depend on the quantum of rents and profits that ought to be credited for the purpose in favour of the plaintiff and of the estates, will be ascertained in the ordinary mode.

Something was said in the argument of the Statutes of Limitations ; but in consequence of the late Lord Kensington's connection at once with the charge itself, and the estates charged, his double right, and his possession of the estates (if for no other reason), those statutes are all plainly inapplicable. I may add, that the circumstance of the present Lord Kensington being the plaintiff in this litigation, though not I think prejudicing, yet certainly does not assist, his case.

I confess, that it has seemed to me very possible that, if in making the arrangements preliminary to the plaintiff's marriage, the state of things now existing, or said by the incumbrancers to exist, as to interest on the 20,000*l.* prior to his father's death, had been foreseen or thought of, it would have been guarded against,—would have been prevented from arising ; and a suspicion of this kind has tended to dispose me, at least as far as * could be proper, towards a construction favourable to the * 149 plaintiff in this respect of the settlement of 1833. But after all it is mere conjecture, and the terms of the instrument are, I am convinced, too strong to bend or be surmounted.

Therefore, although almost unwillingly, I must hold that our order to be made on the motion and rehearing, should, after a declaration of the extent of the late Lord Kensington's power, and that he fully exercised it, discharge the chief clerk's certificate, so far as the interest on the 20,000*l.*, previous to the late Lord Ken-

sington's death, and the rents and profits of the estates charged, which accrued due in his lifetime, after the settlement of 1833, or belonged to his life-interest in those estates, are concerned, and should also direct an inquiry and an account of what, if any, interest on the 20,000*l.* was due at his death. In making which inquiry, and taking which account, regard should be had to the rents and profits of the estates charged, which, after the charging deed of the 4th of February, 1835, were received by the late Lord Kensington, or by his order, or for his use in his lifetime, or, since his death, by his executor, and incumbrancers, or any one or more of them, in respect of his life-interest, or to so much of those rents and profits as were properly applicable, and ought to have been applied, in or towards keeping down the interest of the 20,000*l.*, or any part of it. And an account, I conceive, should accordingly be taken of those rents and profits; and there should also, I think, be an inquiry how much of them was so applicable, and ought to have been so applied. And in making the inquiries, and taking the accounts, the rents and profits received by Mr. Harrison, or by his order or for his use, under the deed appointing him receiver, must be considered as received by him in the character of agent

* 150 of the late Lord Kensington. In * other respects the decree may well, I suppose, stand as it does.

The costs of all parties of the appeal, motion, and of the rehearing ought, in my opinion, to be costs in the cause.

THE LORD JUSTICE TURNER. — The bill in this case is filed by Lord Kensington, for the purpose of redeeming a charge of 20,000*l.* upon the Kensington estate comprised in the settlement made upon his marriage. The charge thus sought to be redeemed was created under a power contained in the marriage settlement. At the date of the settlement the late Lord Kensington was seised in fee of the Kensington estate, subject to a mortgage in favour of Lord Braybrooke and others for the sum of 60,000*l.* and interest, and this sum was also secured upon the Lambister Rectory and tithes, another estate belonging to the late Lord Kensington. By the settlement, which was dated the 10th of October, 1833, the Kensington estate was settled subject to the mortgage for 60,000*l.* and interest. [His Lordship read the material parts of the settlement.]

In pursuance of the power contained in the marriage settlement,

the late Lord Kensington executed an indenture, dated the 4th of February, 1835. [His Lordship read the material parts of the several deeds above stated.]

The interest upon 20,000*l.* was paid by the late Lord Kensington during his life; but it was alleged, and, for the purposes of argument, was admitted, that the rents of the Kensington estate, after paying thereout the interest on the 60,000*l.*, were insufficient to answer the payments made by the late Lord Kensington for interest upon the 20,000*l.*

* The late Lord Kensington died in 1852, and no doubt * 151 therefore the plaintiff is entitled to redeem the charge. The question is, on what terms he is entitled to redeem it. On his part it has been contended, that he has the right to redeem upon payment only of the 20,000*l.*, and the interest upon it from the time of the death of the late Lord Kensington; and the Master of the Rolls has been of that opinion; but, on the other hand, it has been insisted, that the plaintiff is not entitled to redeem, except upon the terms of paying, not only the 20,000*l.* and interest from the death of the late Lord Kensington, but also the interest upon the 20,000*l.* accrued in the lifetime of the late Lord Kensington, so far as the rents of the Kensington estate were insufficient to satisfy that interest, after first paying thereout the interest upon the 60,000*l.* This is the first and most material question in the cause.

It depends, it seems to me, upon three points: first, whether the late Lord Kensington had power, as between himself and the parties entitled in remainder under the settlement, to charge the estate with the interest upon the 20,000*l.* to accrue during his life; secondly, whether if he had the power so to charge the estate, he has in fact so charged it; and, thirdly, whether, if he has in fact so charged the estate, the charge is subsisting, so far as the rents have been insufficient to answer the interest. For whose benefit the charge subsists, if it is in fact subsisting, does not appear to me to be a question with which the plaintiff is concerned.

Upon the first point it was argued, on the part of the plaintiff, that the power contained in the settlement did not, as between the tenant for life and the parties entitled in remainder, warrant any charge upon the *corpus* of the estate beyond the principal sum of 20,000*l.*, and that no interest accrued during the * life * 152

of the late Lord Kensington could therefore be charged upon the *corpus*, and this argument was attempted to be supported by the circumstance of the trusts of the term to be created under the power being limited to raising by way of mortgage the money to be charged, and also by reference to the inconvenience necessarily involved in the retrospective account of the rents consequent upon the interest being charged during the life of the late Lord Kensington, inconveniences which were strongly urged both upon this and upon the other parts of the case. But the power in this settlement in terms authorizes the interest to be charged, and authorizes it to be charged with the principal for the use of the late Lord Kensington, his executors, administrators, and assigns, and the term is to be created for the purpose of raising the money and interest to be charged; and under such a power, contained in a settlement, under which the late lord was himself made tenant for life, I think that a context, much more strong than any which I can find in this instrument, would be necessary to warrant the position for which the plaintiff has contended; the more so as this is not a case of an ordinary settlement by parties having distinct interests in the estate to be settled, but the case of a settlement by a tenant in fee who, as it appears from other parts of the instrument, intended to reserve and has reserved to himself other benefits out of the estate. It is, in my opinion, plain, that upon the true construction of this settlement the late Lord Kensington had, as against the parties entitled in remainder, the full right of charging the estate with the 20,000*l.* and the interest upon it from the date of the charge. To adopt the contrary suggestion would be, I think, to act both against the letter and the spirit of the settlement; and, with reference to the arguments from inconvenience,

I apprehend that, however much weight may be due to such * 153 arguments where the rights * are doubtful, there is no place for them where the rights are clear. A positive right cannot, as I conceive, be taken away upon the ground of the inconvenience which would be consequent upon enforcing it.

Upon the second point it was argued for the plaintiff, that, although the deed of the 4th of February, 1835, in terms, charges the estate with the 20,000*l.* and interest from the date of the deed, the trusts of the 1500 years' term being limited to raising the 20,000*l.*, without mention of the interest, show, more especially when taken in connection with the proviso that it was

not intended that the interest should run until mortgages of the term were created, and that the proviso of itself shows that it was not the intention of the late Lord Kensington to charge against the estate in his own favour any interest which might accrue during his life. But the estate being clearly charged with the 20,000*l.* and interest from the date of the deed, that charge cannot, I think, be cut down by the deficiency of the means provided for raising it. The late Lord Kensington might well be content, as between himself and the estate, to rely upon the charge, and it might well be thought that the term would only be required to be dealt with when the interests of third parties were concerned; and, with respect to the intention of the late Lord Kensington, said to be indicated by the proviso, it is sufficient to say that the proviso does not reach the case which has occurred.

The question then is reduced to this, whether the charge subsists so far as the rents have been insufficient to answer the interest. The first consideration with reference to this question is, Upon what does the question depend? Does it depend upon any obligation or duty which attached upon the late Lord Kensington, or does it depend upon his intention expressed or to be presumed? The law * does not, so far as I am aware, cast * 154 upon tenants for life any obligation or duty to pay the interest upon charges affecting the inheritance beyond the amount of the rents, and the question, therefore, cannot depend upon any obligation or duty, but must depend upon intention. We must consider then how the case stands in this point of view. The interest, as well as the principal, of the 20,000*l.* is charged upon the estate, and if the rents fall short of the interest, the deficiency, not being payable by the tenant for life, must fall upon the *corpus*. That deficiency was provided by the late Lord Kensington out of his other property. He has declared no intention to exonerate the estate. The real question, therefore, in this case, assuming that there was no evidence of intention, and that the question was simply between him and the estate, would be, whether the Court ought to presume that he intended exoneration? In ordinary cases a tenant for life paying off a charge upon the estate, is not presumed to have intended to exonerate it;¹ and I think it would be difficult to draw any sound distinction between the ordinary

¹ See 1 Story Eq. Jur. § 486.

case and the case before us. In both cases what is paid by the tenant for life is in discharge of the inheritance, and the effect to be attributed to the payment cannot surely depend upon the mode in which the charge arises. If, therefore, this case rested between the estate of the late Lord Kensington and the settled estate, and there was no evidence of intention, I should feel great difficulty in coming to the conclusion that the estate of the late lord was not entitled to a charge upon the inheritance for the excess of the interest beyond the amount of the rent. But it is not, I think, necessary to decide that point, for immediately upon the creation of the charge for the 20,000*l.* and interest, the late Lord Kensington mortgaged both the charge and the interest, and I do not see

how any presumed intention on his part could affect his
* 155 mortgagees. * It was attempted in argument to distinguish this case of the tenant for life paying interest beyond the amount of rent from the ordinary case of a tenant for life paying off a charge; but the argument failed to convince me that any well-founded distinction exists between the cases. It was much pressed that in such a case as the present, the remainder-man would have no means of knowing that the charge had been created, or that the interest upon it had not been kept down, and could not therefore resort to the ordinary remedy of applying to this Court for the appointment of a receiver; but in this case the plaintiff clearly knew of the creation of the charge, for he was party to some of the deeds by which the charge was incumbered, and the question he must have had to consider, with reference to an application to this Court, must have been, not whether the rent was properly applied, but whether the estate was properly let and the rents properly collected, matters as to which he would have the same means of information in this as in the ordinary case. It was also pressed in argument on the part of the plaintiff, that the mortgagees, having been paid the interest upon their mortgages, could not claim the interest on the 20,000*l.* otherwise than through the late Lord Kensington; but the answer to this argument is that the interest on the 20,000*l.* is made a security to the mortgagees for their principal as well as for their interest.

This case also was put in the course of the argument, that Lord Kensington had paid off the mortgages, and it was asked whether in that case he could have claimed the interest against the estate. But this is not the question before us. It differs from it in this

respect, that the fact of the capital having been paid, taken in connection with the proviso in the deed of charge, might have been considered as evidence of the intention to exonerate * the estate from the capital, and therefore from the inter- * 156 est. The case of *Jones v. Morgan* was relied on by the plaintiff, but in that case the assumed tenant for life had given his own bond for a debt charged on the *corpus* of the estate, and had afterwards paid off the bond, and had made no claim upon the estate in respect of that payment, and from these and other circumstances the Court presumed that he had intended to exonerate the estate, and carried on that presumption to the interest which he had paid upon the mortgage beyond the amount of the income. But the collateral circumstances which existed in that case are wanting here, and divested of those circumstances the case is an authority against, and not in favour of, the plaintiff, for it tends to show that, in the absence of those circumstances, the excess of the interest would have been held to be a charge upon the *corpus* of the estate. I am of opinion, therefore, that there is in this case a charge upon the *corpus* of the estate for so much of the interest upon the 20,000*l.* as the rents of the estate were insufficient to pay.

But then it was contended, on the part of the plaintiff, that the account ought to be taken against the defendants not only of the rents which the late Lord Kensington received, but of those which, without his wilful default, he might have received, and that the account of interest ought to be limited with reference to the Statute of Limitations. I think, however, that the plaintiff's argument is not well founded on either of these points. No special case of wilful default is made by this bill, and this Court, as I apprehend, never directs an account of what, without wilful default, might have been received, otherwise than upon a special case made for the purpose, except in the case of a mortgagee in possession, and in this case I do not think that there has been any possession, either by the late Lord Kensington or by his mortgagees, * which can be referred to the mortgage title. The * 157 late Lord Kensington was in possession when the charge for 20,000*l.* was created, and his continuance in possession cannot, I think, be referred to his title by virtue of the charge. And, with respect to the mortgagees, they were not in actual possession. There was, indeed, the receivership deed, and the receiver, I pre-

sume, collected the rents of some parts of the property comprised in the deed, but his receivership was, as to the Kensington estate, subject to a prior receivership in favour of the mortgagees for 60,000*l.*, and it does not, I think, appear that he was ever in actual possession of that estate. Supposing him, however, to have been so, the possession of such receiver is wholly different from that of a mortgagee. A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and, the estate being, in the eye of this Court, a security only for the money, the Court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this Court, is entitled to it. It is part of his contract that he should do so. But under such a receivership deed as we have in this case the contract is wholly different. The receiver is appointed merely to secure the interest upon the debt, and when that interest has been paid the rents belong to the mortgagor. The account therefore in this case cannot be extended to what the late Lord Kensington might have received without his wilful default; and with reference to the point raised upon the Statute of Limitations, I think that the statute does not apply to a case of this description. The decision in *Burrell v. Lord Egremont*, in which I agree, seems to me to settle that point.¹

*158 *STURGE *v.* THE EASTERN UNION RAILWAY COMPANY.

1855. May 2, 3. June 2. Before the LORDS JUSTICES.

A railway company issued certificates of preference stock purporting to carry "interest" at 6*l.* per cent per annum in perpetuity.

Afterwards they obtained an Act of Parliament, which (after reciting that preference stock had been created, whereby priority was assigned in the payment of "dividends" to the extent of 6*l.* per cent per annum) enacted, that the railway company should pay "dividends" to the holders of such stock at the rate aforesaid, before they should pay any dividend to the holders of any other shares in the company.

By a subsequent Act the company was empowered to issue other shares called

¹ See Sugden V. & P. (14th Eng. ed.) 486.

"debenture shares" bearing "interest" at 5*l.* per cent per annum, and was directed to apply the annual profits in payment: first, of interest on mortgages; secondly, of interest on the debenture shares; thirdly, of the "interest or dividend" on the guaranteed or preference shares and the arrears of such interest or dividends; and, fourthly, as therein mentioned.

A subsequent Act referred to the preference shares as bearing "a preferential interest or dividend."

Held, that the provision as to payment of "dividends" in the first-mentioned Act must be construed with reference to recital in it and to the subsequent Acts, and did not mean a share of current profits merely, but entitled the holders of the preference shares to resort to a subsequent division of profits to make their dividend up to 6*l.* per cent.¹

Seemle, that the recital alone, having regard to the purport of the certificates, would have been sufficient to give this meaning to the word "dividend."

Whether it is competent to companies to create preferential shares under the general powers contained in ordinary Railway Acts, *quære*.²

A preferential shareholder is entitled to file a bill to restrain the company from making a dividend prejudicial to his rights without waiting until there are funds to make a dividend.³

THIS was a motion by way of appeal from an interlocutory order made by Vice-Chancellor Wood, granting an injunction, and by arrangement the cause came on to be heard with the appeal motion.

The bill was filed by Thomas Sturge on behalf of himself and the other shareholders of the Eastern Union 6*l.* per cent preference stock at the time when the stock was redeemed, and it sought a declaration that under the resolutions and Acts of Parliament set out in the bill, the plaintiff, and those on whose behalf as well as his own, the bill was filed, were entitled to be paid, the arrears of interest or dividends, upon their several shares or stock, from the respective times when the interest or dividends upon the same ceased to be paid, up to the time * of the redemption * 159 thereof, in manner mentioned in the bill, and that it might be declared and decreed that the plaintiff and the others on whose behalf the bill was filed were entitled to be paid the amount of

¹ See 1 Lindley Partn. (Eng. ed. 1860) 655; *Stevens v. South Devon Railw. Co.*, 9 Hare, 313; *Henry v. Great Northern Railw. Co.*, 4 K. & J. 1; 1 De G. & J. 606; *Crawford v. North Eastern Railw. Co.*, 3 K. & J. 723.

² See *Kerr Inj.* 559, 566.

³ 2 Dan. Ch. Pr. 4th Am. ed. 1652; *Kerr Inj.* 555; *Crawford v. North-Eastern Railw. Co.*, 3 K. & J. 733; *Stevens v. South Devon Railw. Co.*, 9 Hare, 325; *Corry v. Londonderry and Enniskillen Railw. Co.*, 29 Beav. 263; *Henry v. Great Northern Railw. Co.*, 1 De G. & J. 606.

such arrears out of the moneys to be received by or on account of the Eastern Union Railway Company, under or by virtue of an arrangement or contemplated amalgamation mentioned in the bill, if the same should be carried into execution, or out of any moneys of or belonging to the said company applicable to such payment, before any payment should be made by the company to the ordinary shareholders in respect of dividend or interest, on the ordinary shares or stock of the said company. And it prayed for an injunction to restrain the defendants from paying or declaring any dividend to the ordinary shareholders, until the arrears on the preference shares were paid.

The history of the case was shortly this.

By two Acts of Parliament passed in the months of June and July, 1847, powers were given to the Eastern Union Railway Company to raise two sums of 100,000*l.* and 200,000*l.* by the creation of new shares, but no power was given by these Acts to attach any preference or priority by way of dividend or otherwise, to the shares which were to be created under them.

By another Act of Parliament also passed in the month of July, 1847, provisions were made for amalgamating the Eastern Union Railway Company with another company, called the Ipswich and Bury St. Edmunds Railway Company, under the same title of "The Eastern Union Railway Company," and by this Act an amalgamation was to take place on a certificate being issued by the commissioners of railways; and it was provided that

the profits of the new company should be divided
 * 160 * between the shareholders in the respective companies
 in the proportions mentioned in the Act.

The certificate on which this amalgamation was to take place, was not issued till the 24th February, 1848, but in the mean time the directors of the Eastern Union Railway Company proceeded to raise the sums of 100,000*l.* and 200,000*l.*

At the half-yearly meeting of that company held on the 20th August, 1847, the directors made a report, by which they submitted as their joint recommendation that the sum of 300,000*l.* should be raised by a subscription, and they then proceeded to state that in the then condition of the money market, the directors felt it useless to propose that this capital should be raised without some advantage being secured to those who might subscribe it, but that if the details of the plan, as shown by the resolutions, met the

approval of the company, the directors had every hope that they would have sufficient funds to construct the very important branch to Harwich in a very short space of time, and that a new source of revenue arising from it over all parts of their line would counterbalance entirely any guaranteed preference in the stock.

At the same meeting resolutions were passed, by which the directors were authorized to raise, between the date of the resolutions and the 1st of January, 1849, the two sums of 200,000*l.* and 100,000*l.*, and to grant scrip receipts for such amounts as might from time to time be paid up in respect of such two sums, until each subscriber of 20*l.* and upwards should have paid the amount to be subscribed in full; and that such scrip receipts should entitle the holder thereof, on the 1st January, 1849, to become a registered shareholder in a new Eastern Union stock for the amount he should have subscribed and paid up, upon which he should receive * a guaranteed dividend of 6*l.* per cent per annum * 161 in perpetuity.

The whole of the 300,000*l.*, mentioned in this resolution, was soon afterwards subscribed, and certificates were issued to the subscribers in the following form: "Eastern Union Railway Company. Preference stock, carrying interest of 6*l.* per cent per annum in perpetuity, from the 1st of January, 1849. This is to certify, that the holder of this certificate is entitled to the interest at 6*l.* per cent per annum, on [] pounds of the same stock." To each of these certificates there were annexed coupons, which, on the face of them, were entitled "interest warrants."

After the creation of this stock, and on the 1st August, 1849, the Eastern Union Railway Amendment Act, 1849, was passed, by the fourth section of which it is enacted, that "it shall be lawful for the company to raise the sum of 250,000*l.*, by creating new shares of the said company, in addition to any sums which they are already authorized to raise, with such special advantages in respect of priority or amounts (not exceeding 10*l.* per centum per annum) of dividend, or other regulations, terms, or conditions, in relation to such shares, as may be resolved on by any general or special general meeting of the said company, subject, nevertheless, to the provisions hereinafter contained, touching the priority of existing preference shares; and the capital, so to be raised by the creation of new shares, shall be considered as part of the general capital of the said company."

Section 6 was as follows: "And whereas, under the authority of the said recited Acts, or some of them, 15,000 shares of the nominal value of 20*l.* each were created, and now form
 * 162 part of the capital of the said * company and a priority in the payment of dividends, over the holders of other shares in the said company, to the extent of 6*l.* per centum per annum upon the nominal amount thereof, was assigned to the holders of such shares, be it therefore enacted, that such shares shall be called Eastern Union 6*l.* per centum per annum preference stock, and that the said company shall pay dividends to the holders thereof, at and after the rate aforesaid, before they shall pay any dividend to the holders of any other shares in the said company, whether created or issued under the authority of this Act or of the said Acts, or any of them."

Section 7 provided as follows: "That any other shares or stock (if any), which may have been created by the said Eastern Union or the said Ipswich and Bury St. Edmunds Railway Companies, or either of them, at any general or special general meeting of such companies respectively, with any special advantages in respect to priority or amount of dividend payable thereon, shall rank before and take precedence of any shares or stock which may be created under or by virtue of this Act."

After the passing of this Act, upon the transfer being made of any part of the 6*l.* per cent preference stock, the certificates which had been originally issued for the stock transferred were returned to the company, and new certificates for such stock were issued, which were in the following form:

"Eastern Union 6*l.* per cent preference stock, entitled to a priority in payment of dividends, over the holders of other shares in the said company, to the extent of 6*l.* per centum per annum. 12 & 13 Vict. c. 92. Stock certificate for 20*l.* No. of certificate [].

This is to certify, that , of , is registered
 * 163 * in the books of the Eastern Union Railway Company, for the sum of 20*l.* of the Eastern Union 6*l.* per cent preference stock."

Some time between the passing of this Act and the month of July, 1850, the company raised some part of the 250,000*l.* mentioned in the Act, by the issue of shares bearing a guaranteed preferential interest of 10*l.* per cent per annum.

In the month of July, 1850, another Act of Parliament was

passed, by which, after reciting that the total amount which the Eastern Union Railway Company were authorized to borrow on mortgage under the provisions of the several Acts thereinbefore recited, exclusive of the recited Act passed in the last session of Parliament, was 536,666*l.*; and after reciting, that by the recited Acts the company were authorized to raise the whole or any part of the said amount, which they were so authorized to borrow, by the creation of new shares in their undertaking in lieu of borrowing the same, or, having borrowed the same, to create new shares for the purpose of paying off such loan, or any part thereof, and of converting the same into capital; and after reciting that the company were unable to raise the amount which they had borrowed or were authorized to borrow as aforesaid, or any part thereof, by such shares as they were by the recited Acts authorized to create for the purpose of converting loan into capital, it was thus enacted (§ 6): "That, subject to the provisions of this Act, the directors, with the consent of the company, may from time to time create and issue in the manner hereinafter mentioned, in lieu of such shares as they are by the recited Acts authorized to create for the purpose of converting loan into capital, or in lieu of borrowing the sums which they are by such Acts authorized to borrow, other shares in the capital of * the company; and * 164 the shares from time to time so created shall be called

'Eastern Union Railway debenture shares.'" By the 9th section it is enacted, "That, subject to the provisions of this Act, the directors, with the consent of the company, may from time to time create and issue the said debenture shares, or any of them, at such respective times, and of such respective amounts, and with such respective preferential or other interest or dividend, and with such respective, exclusive, or other rights and privileges, and on such respective terms and conditions as to the respective amounts and times of payment of deposits and calls on and in respect of the same respectively, and as to the redemption or commutation of such shares, or of the interest or dividend from time to time payable in respect thereof, and on such other terms and conditions, and generally in such manner in all respects as the directors, with such consent as aforesaid, shall think fit."

The 19th section of the Act enacted that debenture shares should bear interest at a rate not exceeding 5*l.* a year for all sums paid in respect of those shares; and the 20th section contained

the following enactment: "That, subject and without prejudice to any right or power which the mortgagees and bond creditors of the company, or any of them, have at the time of the passing of this Act, or may hereafter have, of requiring the revenues and income of the company to be applied in or towards satisfaction of the principal moneys due on their mortgages and bonds respectively, the revenues and income of the company from time to time applicable to the payment of interest on the debts of the company, and of interest or dividends on shares in the capital of the company, shall be applied in manner following, that is to say: first,

in payment of the interest from time to time accruing on * 165 or in respect of the mortgage and bond * debt, or such part thereof as for the time being is unsatisfied, and the arrears (if any) from time to time of such interest, according to the legal priorities of such mortgages and bonds respectively; secondly, subject to such first payment, in payment of the interest from time to time accruing on or in respect of the debenture shares for the time being existing, and the arrears (if any) from time to time of such interest; thirdly, subject to such first and second payments respectively, in payment of the interest or dividend upon the guaranteed or preference shares of the company created before the passing of this Act, and the arrears (if any) from time to time of such interest or dividend, in the order prescribed by the recited Act passed in the last session of Parliament; fourthly, subject to such first, second, and third payments respectively, in payment of dividends to the holders of the remaining shares in the company, exclusive of the said guaranteed or preference shares."

By another Act of Parliament, which was passed in June, 1852, reciting the raising of the sums of 100,000*l.* and 200,000*l.* by the issue of shares bearing a preferential interest or dividend at the rate of 6*l.* per cent per annum; and then reciting that 15,000 shares of 20*l.* each had been issued, bearing the preference, interest, or dividend of 6*l.* per cent per annum; and after designating them as preference stock No. 1, and which stock was, by the Eastern Union Railway Amendment Act of 1849, declared to be entitled to a priority in the payment of dividend over the holders of other shares in the company to the extent of 6*l.* per cent per annum, and then reciting the creation of shares under the Act of 1849, which were designated as "preference stock, Nos. 2, 3, and 4," it

was recited thus: "And whereas the company are indebted to creditors not holding security on mortgage * or * 166 bond, on account of land, works, buildings, plant or stock, working expenses, supplies, furnishing, and other matters, and the immediate enforcing of such debts would be productive of great detriment and embarrassment to the company; and whereas the amount owing by the company on mortgage or bond is 620,000*l.*, and the annual sum payable by the company for interest thereon and on other debts, and for dividends upon the said preference stocks and shares, exclusive of the preference shares hereinbefore last mentioned" (meaning exclusively of the shares created under the Act of 1849, not of the shares which had been created previously to that Act), "and besides other fixed charges, amounts to the sum of 70,000*l.* or thereabouts, and the available annual revenue of the company is insufficient for the payment thereof: and whereas the inadequacy of the funds and revenue of the company to meet the various claims thereon has placed its affairs in a state of great embarrassment, and threatens loss and detriment to all parties interested, and serious inconvenience and injury to the public, unless a speedy remedy be provided: and whereas it is expedient that the company should be authorized to make arrangements with the said unsecured creditors, and a large proportion of such creditors are willing to enter into such arrangements." Then it was enacted by § 3, that after the passing of the Act the directors of the company might, with the consent of four-fifths of the shareholders of the common stock of the company present at a meeting to be convened in the manner specified, convert any part of the debts owing by the company, not secured by mortgage or bond, into perpetual stock of the company of equal amount, bearing a preferential "dividend or interest in the nature of dividend, not exceeding the rate of 4*l.* per cent per annum," to be entitled to be paid in priority to any interest or dividend upon preference stock No. 1, No. 3, and No. 4 (that was in * priority * 167 to the 6*l.* per cent stock, and also to the stocks created under the Acts of 1849), and the directors were empowered to create such stocks as might be necessary and sufficient for the commutation of the debts, not exceeding a certain amount, which was to be called "Creditors' Stock," and the directors were to pay the dividends on it; and on that the creditors were to cease to have any interest in respect of their debts.

It appeared by this Act that there were certain shares of the company which had never been issued. These were designated by the 5th section of the Act as unissued shares, and powers were given to the company to create and issue new shares instead of the unissued shares, and the shares which were so raised were to be applicable to the payment of any debts which the company might be liable to at the time of the passing of the Act. By section 7, the directors were empowered, with the consent of four-fifths of the holders of the preference stock No. 1, to attach to the new shares, or any part or number thereof, such "interest or dividend" as the directors might determine, and that interest or dividend when so attached was to have priority over every other stock or shares of the company, except the creditors' stock, and it was provided that the new shares should not in the aggregate exceed 77,825*l*.

The plaintiff Thomas Sturge became the purchaser of 555 shares of the 6*l*. per cent preference stock, in the months of May and September, 1848, and of July and October, 1849; and in the month of July, 1853, he purchased 648 more shares of the same stock. The company paid 6*l*. per cent per annum upon this preference stock, down to the month of June, 1850, but the payment in respect of the stock ceased at that time.

* 168 * It was in this state of circumstances that in the month of August, 1853, the Eastern Union Amendment Act, 1853, was passed, for enabling the company to redeem the preference stock. By that Act the creation of the preference stock before the amalgamation was recited; the Act of 1850 was recited; and then it was recited that since the passing of the last-mentioned Act there had been no revenues or income of the company applicable to the payment of interest or dividend on the shares in the capital of the company; and that accordingly no dividend had been declared thereon, and that, in the then present position of the company, a considerable period might elapse before any portion of its revenues or income could be legally applicable to the payment of interest or dividend on any of the said preference shares, or on its ordinary share capital, and that in consequence thereof, and in compliance with the desire of a large number of the preference shareholders, and for facilitating and enabling them to enter into arrangements with neighbouring railway companies, the company were willing to redeem at par all the preference shares, and that it

was expedient that powers should be conferred on them for such purpose. Then it was enacted thus: "It shall be lawful for the company, and they are hereby required to redeem, in manner hereinafter mentioned, all the said preference shares, by paying in cash to the respective holders of such shares, upon the production of the certificate thereof, at the rate of 109*l.* for shares in the aggregate of the nominal value of 100*l.*, and proportionately for shares in the aggregate of greater or less nominal value, with interest on such redemption money at the rate of 4*l.* per centum per annum from the passing of this Act, and the said respective holders shall accept and take such payment and deliver up the said certificates."

The 7th section of the Act, which is the only other * sec- * 169 tion material to be noticed, contained the following proviso:

"Provided always, that nothing in this Act contained shall be held to take away or prejudice any right to the interest or dividend (if any) due on any preference shares of stock up to the time of the redemption of the same by virtue of this Act, or any remedy at law or in equity for the recovery of such interest or dividend."

In pursuance of this Act the company, on the 16th of February, 1854, paid to the plaintiff Thomas Sturge the redemption money upon the shares held by him, calculated at the rate of 109*l.* per share, with interest upon such redemption money at 4*l.* per cent per annum from the 20th of August, 1853, and he then, in conformity with the Act, delivered up the certificates for his shares, but, at the same time, demanded payment of interest or dividends upon the shares at the rate of 6*l.* per cent per annum from the month of June, 1850, and the demand not having been complied with, he delivered to the company a notice demanding payment of 4570*l.* 3*s.* 8*d.* for the arrears, and stating that he delivered up the certificates under protest, and without meaning to relinquish his right to the arrears.

It was for the recovery of the dividends or interest thus demanded, and upon a suggestion that the company were about to apply their funds in payment of dividends to their ordinary shareholders in contravention of the plaintiff's rights, that the bill was filed.

Upon the injunction prayed by the bill being moved for before the Vice-Chancellor, his Honor made the following order: "This Court doth order that an injunction be awarded to restrain

the Eastern Union Railway Company and Sir Samuel Bignold, Thomas Brassey, &c., or other the directors of the said company for the time being, from declaring or paying any dividend * 170 on the ordinary * shares or stock of the said company, without first paying or satisfying the arrears of dividends due as in the bill mentioned at the time of the passing of the Eastern Union Railway Amendment Act, 1853, in respect of the preference stock or shares in the bill mentioned, until the hearing of this cause or until the further order of this Court, and the said order is to be without prejudice to any question as to the arrears of dividends between the time of the passing of the said Act and of the redemption of such preference stock or shares."

Mr. Rolt and Mr. R. Hawkins were for the plaintiff.

The Solicitor-General, Mr. Selwyn, and Mr. Locock Webb, for the company.

The arguments appear sufficiently from the judgments.

Judgment reserved.

June 2.

THE LORD JUSTICE KNIGHT BRUCE. — With an appeal motion in this cause the cause itself was heard before us in the early part of the last month, and we have now to dispose of both. The motion, which was on the part of the defendants, sought to discharge an interlocutory order made by the Vice-Chancellor Wood in these terms: [His Lordship read it.]

The motion was resisted by the plaintiff, who sought upon the hearing to obtain, with the continuance of the injunction, a declaration of right in conformity with the view on which the * 171 order had been made. The plaintiff * by his counsel, however, at the bar, waiving all claim to an extension of the injunction to the point reserved by the order, waived that point for all purposes of relief in the cause also.

The questions are: first, whether according to the true construction of the Acts of Parliament to which the argument referred, so far as they have any bearing on the dispute, the defendants are, as against the plaintiff and the other persons on whose behalf he sues, entitled to do what the injunction prohibits.

Secondly. Whether if the defendants are not, that is to say, if the point of construction is with the plaintiff, he has by contract or conduct lost the right of availing himself of it.

Thirdly. What, if any, is the effect on the suit of the other or some of the other persons on whose behalf he sues having by contract or conduct lost that right, if the fact is so.

Fourthly. Whether the suit was prematurely or unnecessarily instituted.

Upon the first question, if I entertained any doubt I have ceased to do so. Certainly the Acts of Parliament chiefly or alone material in the dispute are, in part at least, inaccurately worded, as we know that many Acts of Parliament are. But language may be incorrect without being unintelligible. That appears to me to be the case here. Observations, urged with all the ability of which the subject admitted the use, have been made concerning the different meanings properly belonging to the words "dividend" and "interest," and to the words "guarantee" and "preference," concerning the general * Statute of the * 172 8th of the Queen, c. 16, incorporated into the Acts of 1847, and as to 9*l.* being half three years' interest at the rate of six per cent per annum upon 100*l.*, and so on. But the purport and intention of the Acts to be construed become upon this point, after a careful examination of them, plain enough.

The first question, which depends mainly, if not alone, upon the true reading and import of the 4th, 6th, and 7th sections of the Act of 1849, the 20th section of that of 1850, and the 2d, 5th, 6th, 7th, and 8th sections of the Act of 1853, is, I think, as the Vice-Chancellor has thought, with the plaintiff, whose case, if not assisted, is not, in my opinion, worsened by the Act of 1852 or that of 1854.

The second question is one wholly of the effect of the evidence, which, applied as it is to proceedings of the nature and character of those to which it relates, I do not blame myself for not having at once clearly understood and appreciated. Nor was any endeavour wanting on the defendants' side, which legitimately and properly was capable of being used, to show it in the light most favourable to them. The impression, however, on my mind at the conclusion of the argument has been strengthened by subsequent examination of the papers, and I am satisfied that the defendants' case in this respect is a failure. Whatever may be thought of

their conduct, as direct or indirect, whatever of their faith, as bad or good, they appear to me not to have succeeded in impeaching the honesty or behaviour of the plaintiff. I agree with the Vice-Chancellor, that neither contract nor conduct on the plaintiff's part inconsistent with his right to insist in the present suit on the full benefit of the Acts of 1849, 1850, and 1853, according

* 173 to that which *ex facie* is their true interpretation, has been proved, or, indeed, has not been disproved.

Passing for the present over the third question, I conceive that the defendants fail alike on the fourth. Whatever may have been the state, whatever was likely or is likely to be the condition of their revenues, the plaintiff was, in my opinion, entitled to come to this Court for that protection by injunction, which he has had, and that declaration which we mean to give him. The defendants' conduct, previous to the commencement of the cause, and the nature of their defence in it, seem to me conclusive against them on this point. The plaintiff was not bound to wait until there should be funds, if indeed there have not yet been funds applicable to the payment of his demand.

With regard to the third question, I will, for the purpose of it, assume the possibility or even probability, that some of those, on whose behalf besides his own the plaintiff sues, have, by contract or conduct, precluded themselves from denying the character and object which the defendants ascribe to the 9%. added to the 100%. — have precluded themselves from participating with the plaintiff in any benefit derivable from this litigation. The assumption, however, does not seem to me to render a dismissal either total or partial, or an amendment of the bill necessary. But it may be proper, and, on the whole, I think it right, that our order and decree, refusing the appeal motion with costs, making a declaration in conformity with the injunction and continuing the injunction, should be expressly, without prejudice to the question, whether any of the persons, on whose behalf the suit is instituted, other than the plaintiff, has or have, by any contract or contracts, or conduct given up or become deprived of any title to participate in the benefit of it.

* 174 * The defendants have so acted previously to it, and have so defended it, as in my judgment to render them justly liable to all the costs of it, with which accordingly I am in favour of charging them. And, without intending to make any reflection,

or cast any doubt upon the integrity, personally and singly, or the respectability, personally and singly, of any one of the gentlemen who are before us as defendants, I wish to be distinctly understood as thinking it not creditable to them collectively, or to the body whose affairs they manage, that there should have been the just occasion, which, as I consider, there was, for the present litigation, or that a Court of justice should have had imposed on it the duty of dealing with the unconscientious defence, of which I willingly join in completing the defeat commenced by the Vice-Chancellor.

The Lord Justice TURNER, after stating the facts in nearly the words in which they have been already stated, said: From this order the defendants appealed, and upon the appeal motion coming on before us it was agreed, that the cause should be heard with the motion. The cause and the motion have been heard accordingly, and, upon the hearing, the plaintiff waived all claim to any dividends or interest, in respect of the shares subsequent to the time of the redemption.

We have now to dispose of the rest of the plaintiff's claim. The most convenient mode of doing so seems to me to be, to deal with the case as it was presented to us on the part of the defendants.

The case on their part was presented to us in four points of view: 1st. That the plaintiff never had any right to any arrears of dividends or interest, in respect * of the shares in * 175 question. 2d. That if the plaintiff ever had any such right it has been destroyed or lost. 3d. That the suit is not properly framed for the assertion of the alleged right. 4th. That in any event the suit is premature.

The argument on the part of the defendants upon the first point was, that, at the time of the creation of the shares in question, the company had no power to create shares carrying any preferential interest or dividend, and that the shares, therefore, were not originally well created. That upon the true construction of the Acts of Parliament which were passed after the creation of those shares, they give no right to any payment in respect of the shares, except by way of preferential dividend. That dividends, whether preferential or not, are shares of profit merely, and that there having been, as was alleged and not disputed, no profit realized by the company between the month of June, 1850, and the time of the

redemption of the shares, there could be nothing coming to the plaintiff, in respect of dividends during that period.

Whether these shares were originally well created or not, it is not in my opinion necessary for us to decide. It may be assumed, that they were not originally well created, and in dealing with this part of the case, I shall proceed upon that assumption, desiring only, that, in being silent upon the point, I may not be understood as giving the least encouragement to the notion, that it is competent to companies to create preferential shares under the general powers contained in Acts of Parliament of this description.

Setting aside, then, the question as to the creation of these shares, and assuming them not to have been well created, the point under consideration depends, as it seems to me, upon * 176 the construction of the Acts which * were passed after the creation of the shares. By the first of these Acts, the Act of 1849, the company are to pay dividends to the holders of shares of the 6l. per cent preference stock before they pay any dividends to the holders of other shares in the company, and if the case stood upon the enactment alone there would no doubt be strong ground to contend that the dividends to be paid to the holders of the preference stock, though payable in priority, ought to be taken to be dividends of the same nature and character as the dividends payable to the ordinary shareholders. But this enactment is prefaced by a recital, and the recital is, that a priority in the payment of dividends has been assigned to the holders of the preference stock. The recital, therefore, refers us to what has been assigned to the holders of this stock, and when we look to see what has been so assigned, we find that what was proposed to be assigned was a guaranteed preference, that what was resolved to be assigned was a guaranteed dividend of 6l. per cent, and that what was actually assigned was interest at 6l. per cent per annum. It thus appears that the word "dividend," as used in the recital, means, with reference to the holders of this stock, guaranteed dividends or interest. The question then comes to this, whether the word "dividends," as used in the enactment, is to have the same meaning attributed to it as it bears in the recital, or whether its meaning in the enactment is to be governed by the meaning which may be attributable to the word as applied to ordinary shareholders; and

there can, I think, be no doubt that words ought to be construed with reference to the subject to which they apply, and not with reference to the meaning which may be attached to them as applied to a different subject.

It was argued, with reference to this Act, that the true meaning of it was to effect a compromise with the holders * of this preference stock; that the shares having been * 177 created carrying interest, the legislature repudiated the interest, and would concede only dividends with a preference attached to them. But the observations which I have already made seem to me to displace this argument; and it may further be observed upon it, that the Act shows no intention whatever to alter what had been already done, and that it cannot be supposed that if such an intention had been entertained the legislature would have omitted to express it.

If therefore this case had rested wholly upon the Act of 1849, I should have felt little doubt that the dividends upon this preference stock ought to be considered as interest, but the case is more clear upon the subsequent Acts. By the Act of 1850 the income of the company is to be applied, thirdly, in payment of the interest or dividends upon the guaranteed or preference shares of the company before the passing of the Act, and the arrears, if any, from time to time of such interests or dividends in the order prescribed by the Act of 1849. We have here, therefore, an express reference to the arrears of interest or dividends, an expression wholly inapplicable to dividends according to the ordinary meaning of the word. It was attempted to account for this by referring to the fact of shares carrying interest at 10 $\frac{1}{2}$ per cent having been created before the passing of the Act, but it is to be observed, in the first place, that the guaranteed or preference shares which are referred to in this provision of the Act are guaranteed or preference shares in respect of which the order of payment of dividends has been prescribed by the Act of 1849, and that the Act of 1849 does not in terms prescribe any order for the payment of dividends or interest except with reference to the 6 $\frac{1}{2}$ per cent preference stock. It gives power to create the shares carrying interest at 10 $\frac{1}{2}$ per cent, but does not in * terms pre- * 178 scribe the order in which that interest is to be paid.

Assuming, however, as perhaps may be the better opinion, that the shares created under the Act of 1849 ought to be considered

as included in this provision of the Act of 1850, the argument on the part of the defendants is but little if at all advanced, for there can be no doubt that the dividends upon the 6*l.* per cent preference stock would be to be paid in preference to the 10*l.* per cent interest on the shares; and dividends on shares which are payable in priority to fixed interest upon other shares cannot be the common and ordinary dividends.

Again, the Act of 1852 clearly shows that the words "interest or dividends," as used with reference to these shares and otherwise, mean interest. In the recitals we have "15,000 shares of 20*l.* each, bearing a preferential interest or dividend of 6*l.* per cent per annum," and the 14th section of the Act mentions the payment of interest or dividends at the rate of 4*l.* per cent per annum, besides which there is a recital in the Act in which the dividends on these shares are mentioned as part of an annual sum payable by the company.

My opinion, therefore, upon the first point is free from doubt, that, so far as the question depends upon the construction of the Acts of Parliament, the company, at the time of the passing of the Redemption Act, were bound to pay to the plaintiff and the other holders of the 6*l.* per cent preference stock, the arrears of interest upon their shares from June, 1850.

Upon the second point, that the right of the plaintiff to the arrears of interest upon his shares from June, 1850, was destroyed or lost, the argument on the part of the * defendants was this. That the right was destroyed by the operation of the Redemption Act; and further that before the passing of the Redemption Act, there had been such conduct on the part of the plaintiff as to preclude him in equity from claiming these arrears. It was said, that in December, 1851, the plaintiff induced the creditors of the company, or some of them, to agree to enter into arrangements with the company for satisfaction of their debts, upon the terms of his (the plaintiff's) and other preferential shareholders agreeing to modify their claims for interest upon the preferential shares; and that when the creditors had bound themselves by the arrangement on their part, the plaintiff receded from the agreement which had been entered into on his part; secondly, that in April and May, 1852, the plaintiff again agreed to terms with respect to the redemption of the preferential stock, and the payment of interest upon it, and again receded from

his agreement; and, thirdly, that 9*l.*, part of the 109*l.* made payable by the Redemption Act for each 100*l.* stock, was so made payable, and was agreed to be taken by the plaintiff in satisfaction of these arrears. Under these circumstances it was insisted by the defendants, that the saving clause in the Redemption Act being only of the rights (if any) of the holders of the preference stock, that saving clause could not operate in favour of the plaintiff; and, further, that the claim of the plaintiff to insist upon it amounts in equity to a fraud.

But with respect to the mere operation of the Redemption Act, the saving clause would of course prevent it from operating to destroy the plaintiff's right, if at the time of the passing of the Act any such right existed on his part; and with respect to what passed in December, 1851, and April and May, 1852, I think that these shares having been treated in the Act of 1852, which did not pass till the end of June in that year, as subsisting and valid, and * carrying interest at the rate of 6*l.* per cent per * 180 annum, this Court could not, upon the ground of any thing which had occurred before the passing of that Act, be justified in holding that any of them do not carry that rate of interest.

I may add that I have looked fully into the evidence as to what passed at these periods, and that I think it wholly insufficient to establish the case set up by the defendants. As to what passed in December, 1851, I think it clear upon the evidence that the particular terms of arrangement with the creditors, to which the preferential shareholders had agreed, were not even attempted to be carried out; and as to what passed in April and May, 1852, I think that if any agreement was come to on the part of the plaintiff, which I doubt, that agreement was only a step in the negotiations which took place with reference to the Act of 1852, and was put an end to before any thing was done upon it. This part of the case therefore is reduced to what occurred after the passing of the Act of 1852, and upon looking into the evidence upon that subject, I am fully satisfied that it affords no reasonable ground for the case set up on the part of the defendants.

The only remaining objections are, that this suit is not properly framed, and that the bill has been prematurely filed. With respect to the latter point, I am of opinion that there was a sufficient case to justify the plaintiff in applying to the Court for the injunction, and that the objection therefore cannot be supported;

but with respect to the former point, I much doubt whether the suit is properly framed. Where a plaintiff sues on behalf of himself and others, I apprehend that all must have a common right.¹ I doubt whether the right in this case is not rather

* 181 a separate right in each holder of this stock * than a common right in all the holders of it. The point, however, is not material, as the late Act of Parliament has removed all objections upon the ground of misjoinder, and independently of the Act it would have been in the power of the Court to give leave to amend, which, in a case of this nature, we should have felt bound to do.²

I concur in the decree as proposed.

EARL OF MANSFIELD *v.* OGLE.

1855. June 6, 7, 9. Before the LORDS JUSTICES.

A reversioner in fee expectant on the death of a tenant for life aged sixty-one, mortgaged in 1819 his reversion by way of trust to secure repayment of an advance of 500*l.* on the death of the tenant for life, with 500*l.* more if the tenant for life died within five years, and twice as much more if he died after that period: *Held*, under the law then in force, that the security was void as usurious.

To a foreclosure bill filed by a mortgagee stating subsequent incumbrances, and that some specified defendants claimed an interest in the mortgaged property, one of these defendants put in an answer claiming to be entitled under the above-mentioned security. By the decree the usual reference was directed as to incumbrances and their priorities. The above defendant claimed as an incumbrancer under this decree and the Master disallowed his claim: *Held*, that the Master had jurisdiction so to decide, although the security was not impeached by the pleadings.

THIS was an appeal from an order of Vice-Chancellor STUART, allowing exceptions to the report of Master RICHARDS, made under an order directing him to inquire and state what charges and incumbrances there were affecting the estates in the pleadings mentioned, and to state their priorities, and to take an account of the principal and interest due upon such incumbrances, with

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 240 *et seq.*

² See 1 Dan. Ch. Pr. (4th Am. ed.) 284.

liberty to state special circumstances as to the charges and incumbrances.

The suit was that of a mortgagee seeking to redeem prior incumbrances and to foreclose subsequent ones, and the Master, in executing this decree, had treated as void a security made to two mortgagees, named Complin and Wheeler, in 1819, which was subsequent to one of the plaintiff's securities and prior to another. The interest * of Complin under this security * 182 had become vested in his representative Mr. Cobb, one of the defendants, — the present respondent, — with respect to whom and other incumbrancers, the bill, without particularizing their securities, alleged that they claimed an interest in the mortgaged premises.

Mr. Cobb by his answer stated the particulars of his security, which was created by indentures of lease and release dated 14th and 15th May, 1819. By the latter deed, after reciting that the mortgagor was entitled to the property in fee-simple, subject to the life-estate of his father, and that he had occasion to borrow 2000*l.*, which Henry Wheeler and Edward Complin had agreed to advance upon the terms following: viz., Wheeler, 1500*l.*, and Complin, 500*l.*, on the day of the date thereof, which sums were to be repaid to them on the death of the mortgagor's father, and as much more, viz., 1500*l.* more to Wheeler and 500*l.* more to Complin, provided the father should happen to die within five years from the date of the deed, but if he should survive that period, then that, on his death after that period, 1500*l.* and twice as much more should be paid to Wheeler, and 500*l.* and twice as much more to Complin. It was witnessed that the mortgagor granted and released the property, subject to the life estate, to a trustee upon trust, on the death of the mortgagor's father, if the same should take place within five years, to raise 3000*l.* and 1000*l.* for Wheeler and Complin respectively, but if the father should live beyond five years, then to raise 4500*l.* and 1500*l.* for Wheeler and Complin respectively.

The plaintiff filed a replication, and in 1849 the decree was made.

Mr. Cobb went in under the decree, and claimed to be * an incumbrancer for 1500*l.*, with interest from the 14th * 183 of August, 1844, when the father died. The Master disallowed the claim, on the ground that the deed was void for usury,

the mortgagor's father having been born in 1758, so that, unless he had lived to the age of 101, more than 5*l.* per cent must have been paid.

The Vice-Chancellor held that the Master had no jurisdiction to entertain the question, inasmuch as the deed was not sought to be impeached by the bill; and on Mr. Cobb consenting to accept the 500*l.*, with lawful interest, an order was made establishing his security to that amount.

From this decision Lord Stafford, a co-defendant and subsequent incumbrancer, appealed.

Mr. Lee, Mr. Bagshawe, and Mr. Bagshawe, Jr., in support of the appeal. — On the question of the jurisdiction of the Master they referred to *Dunn v. Calcraft*, (a) *Whitaker v. Wright*, (b) *Rundell v. Lord Rivers*, (c) *Moore v. Battie*, (d) *Tunstall v. Trappes*, (e) and on the question of usury they referred to *Burton's Case*, (g) *Clayton's Case*, (h) *Button v. Downham*, (i) *Mason v. Abdy*, (k) *Chesterfield v. Janssen*, (l) *Wortley v. Pit*, (m) *Roberts v. Tremayne*, (n) *Richards v. Browne*. (o)

They also referred to *Bromley v. Holland*, (p) *Morse* * 184 * *v. Wilson*, (q) *Scott v. Nesbit*, (r) *Fereday v. Wightwick*, (s) *Doe v. Chambers*, (t) *Doe v. Gooch*. (u)

Mr. Bacon and Mr. C. M. Roupell, for the respondent Mr. Cobb. — If our security had been attempted to be impeached by the bill, relief could only have been had on the terms of paying us what was justly due. *Hindle v. O'Brien*, (v) *Barnes v. Hedley*, (w) *Fitzroy v. Gwillim*, (x) *Scott v. Nesbit*. (y) We ought not to be

(a) 2 Sim. & St. 56.

(b) 2 Hare, 310.

(c) 1 Phil. 88.

(h) 5 Rep. 70 a.; S. C., 2 And. 15; Moor. 15.

(i) Cro. Eliz. 642.

(k) 3 Salk. 390.

(l) 1 Atk. 301.

(m) 1 Ves. 164.

(n) Cro. Jac. 507.

(o) Cowp. 770.

(p) 5 Ves. 610; 7 Ves. 3.

(q) 4 T. R. 353.

(d) 1 Eden, 273.

(e) 3 Sim. 301.

(g) 5 Rep. 69.

(r) 2 Bro. C. C. 641.

(s) 1 Russ. & Myl. 45.

(t) 4 Campb. 1.

(u) 3 B. & A. 664.

(v) 1 Taunt. 413.

(w) 2 Taunt. 184.

(x) 1 T. R. 153.

(y) 2 Bro. C. C. 641; 2 Cox, 183.

in a worse position because our security is not impeached by the plaintiff, but by a co-defendant.

But there is no valid ground for impeaching the deed, the contract being one of uncertain event, depending on the duration of life.

They referred to *Bernal v. Marquis of Donegal*, (a) *Mathews v. Lewis*, (b) *Batty v. Lloyd*, (c) *Button v. Downham*, (d) *Richards v. Brown*, (e) *Chillingworth v. Chillingworth*. (g)

The case stood over till the 9th of June, for their Lordships to consider whether they required to hear a reply.

June 9.

On this day no reply was called for, and their Lordships gave judgment as follows:—

THE LORD JUSTICE KNIGHT BRUCE.—The order under appeal in this case was made by one * of the learned Vice-Chancellors upon exceptions taken to a report of Mr. RICHARDS, the Master in the causes. It was made upon exceptions only, not one of the causes, in which the Master reported, having then been before the Vice-Chancellor for further consideration or further directions. The reference under which the Master had proceeded was contained in a decree dated in 1849, and was in these words: [His Lordship read it.]

The Master, in executing this decree, treated as void a security made to Mr. Complin and another, in the year 1819, which, according to its tenor, did, if valid, create in Mr. Complin's favour a charge on the estates the subject of the decree. The Master is on each side represented as having done this on the ground that he considered the security usurious. The exceptions which were taken by Mr. Cobb, the representative of Mr. Complin, brought into dispute the accuracy of this conclusion, and the first point for present determination is the question, whether, according to the law of England as it stood in the year 1819, the security of that year, which (as the foundation of the claim of the exceptant and

(a) 3 Dow. 133.

(b) 1 Anst. 7.

(c) 1 Vern. 141.

(d) Cro. Eliz. 643.

(e) 2 Cowp. 770.

(g) 8 Sim. 404.

respondent Mr. Cobb), is now under consideration, was usurious in its nature, and, consequently, illegal.

We may, therefore, ask, whether, if none of the suits before us had existed, and a bill had been filed by Mr. Cobb, for the purpose of obtaining the benefit (so far as Mr. Complin's title or claim was concerned) of the security of 1819, and the suit had been defended, on the ground, and only on the ground, that the instrument was founded upon an usurious contract, and executed for carrying that contract into effect, and the bill and defence had been supported and opposed, on the materials which were before Mr.

* 186 RICHARDS when he made *the report before us (those materials being considered as including the admission that I shall presently mention), the bill must have failed and been dismissed on the merits, — failed, that is, and been dismissed by reason of usury. Upon this I had, at first, some doubt, but subsequent reflection, aided by closer attention to the language of the security, to the case of *Richards v. Brown*, as reported by Mr. Henry Cowper, and to the express admission made in this Court on Mr. Cobb's part, that the birth of the elder Mr. Ogle, the father of the grantor of 1819, took place in the year 1758, and, consequently, upwards of sixty years before the transaction of 1819, has convinced me that it was one substantially of borrowing and lending, on usurious terms; that the form of the instrument of 1819 was merely a contrivance, an ineffectual contrivance, to evade the law by concealing or colouring the true nature of the business; and therefore that, in such a suit as I have supposed, the instrument must have been decided to be void, and the bill would have been on the merits dismissed. Thus far I agree, perhaps, with the Vice-Chancellor, but assuredly with the Master, who has reported against the validity of the instrument, treating it as not creating a charge on the lands purporting to be charged by it. His reason, I repeat, having been that the instrument, and the contract which it was intended to effectuate, were in his judgment usurious.

The next question then is, whether the Master, satisfied as to the true age of Mr. Ogle the father, could properly have done otherwise. I think that he could not. The decree of 1849, which alone gave him authority, did not establish, did not declare valid, did not set up, the instrument of 1819 as a charge or security, or for any purpose; nor, on the other hand, as I collect,

* 187 *was it impeached, or sought to be set aside by any part

of the previous pleadings, but neither was its validity for any purpose conceded by any part of those pleadings, except, indeed, that by Mr. Cobb's answer it was alleged and insisted on. This, however, amounted substantially to nothing, the answer having been replied to. The decree gave the Master jurisdiction and power to inquire whether the instrument of 1819 did create a charge or security on the lands mentioned in it, and, entering upon that inquiry, he was bound to answer it to the best of his ability, according to his view of the law applicable to the facts.¹ He had no jurisdiction to consider the fitness or unfitness, the justice or injustice, of allowing to Mr. Cobb the money advanced by Mr. Complin, with legal interest. That point, if in the suits before us it could have been or can be at all entered upon, did not belong to the Master's office; was not within his province. I conceive, therefore, that Mr. RICHARDS dealt accurately with the security of 1819, did so, perhaps, independently of the assumption, that the age of Mr. Ogle, the father, was substantially admitted before him, as it has been admitted here, but certainly did so upon that assumption, and the assumption is one which, in my opinion, may with propriety and ought to be made.

It seems to me, accordingly, that it would have been right to make no order upon the exceptions before us, except an order overruling them with costs, and my judgment is for so dealing with the matter now.

THE LORD JUSTICE TURNER. — This appeal involves two questions, — one of form, the other of substance.

The question of form is this: Lord Mansfield, who is * the first incumbrancer in the suit, has also an incum- * 188 brance subsequent in point of date to the mortgage under which Mr. Cobb claims. He filed the present bill, an ordinary bill for foreclosure. He made parties defendants to that suit, thirty-eight persons, including Mr. Cobb, alleging only that they claimed some interest in the subject of the security, but without any allegations particularizing what were the rights and interests claimed by those defendants. Mr. Cobb put in his answer to the bill, and in his answer he set out his mortgage-deed and insisted upon it. The answer was replied to, and a decree was made in

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1297, 1298.

the cause directing an inquiry what charges and incumbrances there were upon the estate, directing the Master to state their priorities, and directing also a sale of the estate. In the course of the prosecution of that decree Mr. Cobb claimed before the Master to establish his mortgage security upon the estate as one of the charges and incumbrances which the Master was directed to ascertain. The claim was objected to on the ground of usury, and the Master reported against it. To that report Cobb excepted, and the Vice-Chancellor allowed the exception, his opinion being that it was not competent to the Master, nor to the Court, under a decree upon such a suit, to adjudicate upon the question of usury. This decision was complained of, not by the plaintiff, but by a subsequent incumbrancer.

This question of form is not unimportant as affecting the practice of the Court, nor is it, perhaps, altogether free from difficulty; but, on the best consideration which I can give to it, I am unable to bring my mind to the conclusion at which the Vice-Chancellor has arrived. The duty of the Master was to execute the decree of the Court, and the decree directed him to inquire what incumbrances there were affecting the estate.¹ Now a mortgage * 189 which is successfully impeached on the ground * of usury is wholly void, both at law and in equity, and therefore can be no charge on the estate. To say, therefore, that the Master was bound to find it a charge, is to say that he was bound to find in direct contravention of the facts.

The argument for the respondents was put thus: that the plaintiff coming for redemption is bound to pay the principal and interest justly due. But this rule does not seem to me to reach a case like this. In the first place, I am not prepared to admit that a plaintiff filing such a bill as this, alleging that the several defendants claim an interest, is to be considered as tendering redemption to those defendants. Such a bill may be considered as offering only to redeem those who, upon investigation, appear to have a right to be redeemed. But supposing this to be otherwise, the replication denies the answer, and surely a decree directing an inquiry must set the whole at large. The object of the inquiry is to ascertain who are the parties entitled to redeem, or to participate in the proceeds of a sale.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1297, 1298.

This view of the case seems sufficient of itself to dispose of the respondent's argument; but it is a very limited view. We have here, as in most cases of this description, a number of defendants claiming in succession incumbrances upon the property in question. The decree first raises the issue between the co-defendants, there having been no issue between them till the decree. Yet if the respondent's argument is right that issue could never be tried, and on the first mortgagee filing a bill for foreclosure a third mortgagee would be precluded from disputing an usurious second mortgage; for according to the forms of the Court the second mortgagee would redeem the first, and then the third must redeem the second or be foreclosed. The effect, therefore, * if the respondents were held to be right, would be this, to * 190 put it entirely in the power of the first mortgagee to alter the rights of the third mortgagee. It was said, in answer to this argument, that the third mortgagee claims under the mortgagor, and was, therefore, subject or subsequent to the second, but, at all events, he must have the same right as the mortgagor to dispute the prior mortgage for usury.

On behalf of the respondents *Dunn v. Calcraft* was relied upon; but that case, as I understand it, goes no further than this, that collateral matter affecting the plaintiff's title cannot be brought forward unless put in issue by the pleadings. It certainly did not decide that the allegation of a claim by a defendant amounted to an admission of his right. Besides, in this case, the collateral matter was brought forward as soon as the decree directed an inquiry, and as soon as the issue between the defendant and his co-defendants was raised.

In support of the Vice-Chancellor's judgment the case of *Scott v. Nesbit* was also relied upon, but there the decree directed an account of what was due upon the judgment affected by usury, and of course the Master was bound to execute the decree. I think that he was no less bound to do so in the present case, and that he has properly entertained the question as to the validity of Mr. Cobb's security, and that this exception to the report ought not to have been allowed on the ground of his having done so.

The question then remains upon the merits, and on these I entertain as little doubt. A sum of 500*l.* was advanced by Complin to the person entitled to the reversion, upon these terms, that if the tenant for life * died in five years Complin * 191

should receive back 500*l.* and as much more, viz., 1000*l.* in all; but if the tenant for life died after the expiration of five years Complin was to receive back 500*l.* and twice as much more, that is, 1500*l.* in all; and the tenant for life was at that time sixty-one years of age. The result of such a transaction would be, that in no possible state of circumstances could Complin receive back less than his principal and upwards of five per cent interest, unless the tenant for life should have happened to live to attain the age of 101.

It was argued by the respondents that this was a mere case of wager, being the payment of a sum certain to receive back a larger sum upon a contingency, and no doubt there may be such a transaction which would not be open to objection on the ground of usury. The transaction may be no more than the sale of the reversion of a certain sum payable at a future contingent period, as in *Batty v. Lloyd*, (a) but on the other hand it is not to be denied that a transaction of this kind opens a very easy door to the evasion of the statutes against usury, and the Courts, therefore, have always watched such transactions with jealousy, — each case depending on its own circumstances. The Court must in each case ascertain what was the true intent and meaning of the parties. Was the intent under colour of risk, wager, or sale to obtain more than the rate of interest allowed by law? This question can only be answered by looking at the instruments which the parties have executed and the facts surrounding those instruments. Applying this test to the case, we find the transaction on the face of it purporting to be a loan, not a sale; the deeds speaking of money lent and of money to be repaid. This alone, * 192 * perhaps, would not be decisive. There might perhaps be a bargain depending on the contingency of the interest exceeding or falling short of five per cent. But what appears to me decisive is, that in no case can the lender receive back less than his principal and interest thereon at five per cent, unless the tenant for life, being 61 years of age at the time of the transaction, should live to attain the age of 101 years. The chance, therefore, of Complin getting more than his principal and five per cent interest is the same as that of a person aged 61 not attaining 101, that is, at least 5,000 to 1, and possibly 50,000 to 1.

Surely it is impossible for any reasonable man to believe that

(a) 1 Vern. 141.

this was the real bargain between the parties, or that such a contingency could enter into their calculations. I think it wholly impossible to suppose such to be the intention. My clear opinion is that this contingency was wholly colourable, and that the true object of this transaction was to secure the payment of an usurious rate of interest.

I think, therefore, that this deed is void, and that the exception must be overruled with costs. No costs of the appeal.

* In the Matter of The LONDON AND BIRMING- * 198
HAM EXTENSION AND NORTHAMPTON, DAV-
ENTRY, LEAMINGTON, AND WARWICK RAILWAY
COMPANY, and in the Matter of The JOINT-STOCK COM-
PANIES' WINDING-UP ACTS, 1848 and 1849.

HOPKINSON'S AND UNDERWOOD'S CASE.

1855. March 27. Before the LORDS JUSTICES.

By the subscription contract of a provisionally registered railway company, giving the usual powers to the committee of management, the subscribers covenanted that in the event of the application to Parliament being unsuccessful, they would pay and discharge all the costs and expenses which should have been incurred with a view to the formation of the undertaking, and all other costs and charges of every description of and incidental to the undertaking, such costs and charges to be assessed ratably on the sums subscribed by them respectively. On winding up the company under the Winding-up Acts, it appeared that the directors had received from the subscribers more than sufficient to pay all the necessary costs, expenses, and charges, but had applied the moneys to purposes which were alleged by the subscribers to be unauthorized and improper, and a compromise was come to with the directors in pursuance of which the directors paid a sum in full of all demands of the contributories upon them. Claims had been admitted to proof as debts against the company under the winding-up order: *Held*, that a general call had been properly made for the purpose of paying the demands thus proved, whether the creditors could have sued the general subscribers directly or not, as to which, *quære*.¹

¹ See 1 Lindley Partn. (Eng. ed. 1860) 320; Gay's Case, 1 De G., M. & G. 347 and cases in n. (1).

THIS was an appeal from the refusal of Vice-Chancellor STUART to make, on a motion made on behalf of John Gay and of the appellants Jonathan Hopkinson and Joseph Underwood to discharge a call, any further order than the following; viz., that John Gay and the appellants should pay to the official manager of the above company his costs of the application, and that the said John Gay and the appellants should be at liberty to take such proceedings (if any) as they or any of them might be advised before the Master, or otherwise, to have it ascertained and determined whether (as between such of the contributories as were members of the managing committee of the directors of the company and the other contributories, shareholders therein, who

* 194 *executed the subscribers' agreement) the members of the said managing committee, or any of them, were liable to make good for the benefit of the other shareholders who were such contributories, or any of them, any and what sum of money for principal and interest in respect of the difference between the sum of 10,000*l.* paid to the company of proprietors of the Warwick and Birmingham Canal Navigation, and the company of proprietors of the Warwick and Napton Canal Navigation, and the sum of 7300*l.* received by the official manager from Richard Child Heath, the purchaser of the said debt of 10,000*l.*, and interest and costs, which had been decreed to be paid by the canal companies to the official manager in the suit of *Bryson v. The said Canal Companies and others.*

The material facts of the case will be found stated in the reports of *Gay's Case*, (a) down to the periods of the decisions there reported.

After the decision on the appeal in Gay's case, the case against the managing committee was gone into before the Master, and a charge was carried in by the official manager against them, amounting to 29,393*l.* 15*s.*

The investigation of that charge resulted in a compromise, which was entered into under an order of the Master of the 21st of February, 1853, directing that the managing committee should be allowed, in account between them and the official manager and the contributories of the company, the sum of 17,198*l.* 3*s.* 9*d.* as payments properly made by them on account of the company out

(a) 5 De G. & Sm. 122; 1 De G., M. & G. 347.

of the sum of 29,393*l.* 15*s.*, with which they were sought to be charged; and that, in discharge * of the sum of 2195*l.* * 195 11*s.* 3*d.* (being the balance remaining, after deducting the said sum of 17,198*l.* 3*s.* 9*d.*, and the sum of 10,000*l.* alleged to have been paid by the managing committee to the Warwick and Birmingham and Warwick and Napton Canal Companies), the managing committee should pay to the official manager 1000*l.* on or before the 14th day of April then next. And it was further ordered, that the managing committee should, in addition to making such payment, give up all claims whatsoever which they or any of them might then or thereafter have or claim against the company, including all claims for costs and expenses incurred by them or any of them in the matter of the winding up of the company, of the appeals against an order of the Master dated the 6th of February, 1852, and of the appeals then pending against the order of the Master dated the 10th of December, 1852. And it was further ordered, that on payment of the said sum of 1000*l.*, the managing committee should thenceforth be released from all further liability to the said company as managing committee of the said company, except as to any claim which might thereafter be established against them in respect of the said sum of 10,000*l.*, together with interest thereupon or in respect of the claim of Charles Edward Bryson, the plaintiff in the suit of *Bryson v. Warwick and Birmingham Canal Companies and others.* (a)

By the decree of Vice-Chancellor STUART made in that suit, on the 23d of June, 1853, it was declared that under the circumstances the Warwick and Birmingham Canal Navigation Company and the Warwick and Napton Canal Navigation Company were bound to repay the 10,000*l.* in the pleadings mentioned, with interest thereon * at 4*l.* per cent per annum, from the * 196 22d of October, 1845; and it was ordered that the sum of 10,000*l.*, and interest as aforesaid, should be paid to the defendant Henry Croysdill, as the official manager of the London and Birmingham Extension and Northampton, Daventry, Leamington and Warwick Railway Company, by the Warwick and Birmingham Canal Navigation Company and the Warwick and Napton Canal Navigation Company, on or before the 23d of September, 1853; and, in the mean time, it was ordered that the bonds and

(a) See the report of this case, 1 Sm. & G. 447; 4 De G., M. & G. 711.

securities in payment off of which the said sum of 10,000*l.*, or any part thereof, was applied, should be delivered to the official manager as security for the payment of the 10,000*l.* and interest; and it was ordered that the bill as against the defendants the directors of the London and Birmingham Extension and Northampton, Daventry, Leamington, and Warwick Company should be dismissed, so far as it sought relief against them, or against the estate of Richard Carpenter, the costs of the suit of the last-named defendants and of the official manager to be taxed and paid and retained by the official manager out of the estate of the railway company.

On the 11th of July, 1854, an application was made by the official manager to the Master for a call, to provide funds for payment of debts and costs by reason of the Lords Justices having made an order (a) giving Mr. Prichard (who had obtained a judgment at law against the official manager for 3538*l.* 4*s.* 4*d.* debt and costs) liberty to proceed upon that judgment, as he might think fit, the effect of which was then supposed to be that he could apply to a Judge or the Court of Common Law, for leave to issue execution against any individual contributory.

* 197 * In support of the application of the official manager for a call, he was examined, and stated that he was appointed official manager on the 27th of June, 1849, and that from the date of such appointment to the present time he had (more or less) been continually engaged in prosecuting the winding up of the affairs of the said company. He then referred to a schedule to his examination, in which was set forth a list of the several debts which had been proved and allowed by the Master as debts due and owing from the company, amounting (together with a sum of 1500*l.*, admitted by the Master to be due to George Pell as one of the local solicitors or agents of the said company) to the sum of 9592*l.* 12*s.* 2*d.* He also referred to the suit of *Bryson v. The Warwick and Birmingham, and Warwick and Napton Canal Companies*, and stated that in consequence of the non-payment to him as official manager of the 10,000*l.* and interest, he had been engaged under the direction of the Master, in taking various proceedings for enforcing the decree; but that the same having proved wholly ineffectual he was then taking proceedings to make the canal com-

(a) See Prichard's Case, 5 De G., M. & G. 484. See also *In re Weiss*, 14 Com. B. 331.

panies bankrupt. After referring to the call of December, 1851, made in pursuance of the decision in Gay's case, to provide a fund for payment of the costs and charges of winding up the company, he stated that the amount received in respect of that call from contributories in respect of 7355 shares, was 1838*l.* 5*s.* 9*d.*, and that contributories in respect of 12,695 shares had failed to pay the call, and that he had up to the then present time been unable to obtain payment thereof from any of the last-mentioned contributories, notwithstanding every exertion had been used to obtain payment, and that in his judgment and belief very little, if any thing further, would be realized in respect of that call. He said that all the sums received by him had been insufficient to pay the costs, charges, and expenses of * winding up the * 198 company, as taxed and allowed by the Master. The examinant further stated that an action had been commenced against him by Mr. Prichard for the recovery of 4551*l.* 9*s.* 8*d.*, as the balance claimed by him to be due from the company, and that this action having been referred to arbitration, pursuant to an order at Nisi Prius made on the trial, an award, dated the 7th of November, 1853, was made for 1745*l.* 18*s.* 8*d.*, which, together with costs, the Master had allowed as a debt against the said company. The examinant then referred to the order of the Lords Justices of the 28th of June, 1854, on the application of Mr. Prichard, (a) directing that Mr. Prichard should be at liberty to take such proceedings at law as he might be advised on the judgment obtained by him against the official manager, and against any one or more of the contributories. And it was ordered, that if the Master should make a call on the contributories for the amount of the judgment debt due to Mr. Prichard, Mr. Gay, or any other person interested, was to be at liberty to apply to their Lordships on the subject of the aforesaid proceedings at law.

The examinant further stated that the amount required to be raised by means of a call, in order to supply the whole sum for the time being intended to be raised for payment of the debts already approved and admitted (amounting to 9592*l.* 12*s.* 2*d.*), and of the estimated amount of the costs, charges, and expenses in the proceedings for winding up this company (amounting to 3800*l.* or thereabouts), would be 13,392*l.* 12*s.* 2*d.*, and that the amount of

(a) See Prichard's Case, 5 De G., M. & G. 484.

call which would be necessary to supply the whole sum for the time being intended to be raised would be 1*l.* 8*s.* 6*d.* per * 199 share for debts and * 11*s.* 6*d.* per share for costs, making together 2*l.* per share.

On a subsequent examination of the official manager, taken on the 11th of November, 1854, he stated that since his former examination he had succeeded in obtaining an adjudication of bankruptcy against the Warwick and Napton Canal Company, from which adjudication a petition of appeal had been presented by the canal company, and had come on for hearing on the 4th of November, 1854, when the Lords Justices reserved their judgment thereon. (a) That on the 6th day of November, 1854, a

(a) *Ex parte* WILLIAM HENRY CROYSBILL, In the Matter of The WARWICK AND NAPTON CANAL COMPANY.

1854. September at Birmingham. Before Mr. Commissioner BALGUY. Lincoln's Inn, November 4. Before the LORDS JUSTICES.

Held, by the commissioner, that an incorporated canal company, whose profits arose from tolls, was as a "commercial company," or a company associated for commercial purposes, liable to become bankrupt under the 7 & 8 Vict. c. 111. On appeal judgment was reserved and the case compromised.

As this is (as it is believed) the only case in which the question has arisen whether an incorporated canal company, the profits of which arise from tolls, is a "commercial or trading company," or a company associated together "for any commercial or trading purposes," within the 7 & 8 Vict. c. 111, so as to be liable to become bankrupt, a short note of it is subjoined. The Warwick and Napton Canal Company was incorporated by Act of Parliament, with the usual powers of taking tolls on the traffic on the canal. In June, 1853, a decree was made in *Bryson v. Warwick and Birmingham and Warwick and Napton Canal Companies* (see 1 Smale & Giffard, 447), directing the canal company to pay to the official manager of the London and Birmingham Extension Railway Company, 10,000*l.* Upon the failure of the canal companies to pay this sum, a petition for adjudication in bankruptcy was filed by the official manager of the railway company against the Warwick and Napton Canal Company. By arrangement the liability of the canal company to become bankrupt was argued by counsel on the application for an adjudication, instead of waiting until the time for showing cause.

The commissioner held that the company was within the Act, but did not state the grounds on which his judgment was founded.

Among those adduced before him in support of the application for adjudication were the following: that the word "commercial" must have a meaning given to it different from that of the word "trading." That according to the most probable construction the words of the Act must be construed as designating a purpose of pecuniary profit, as distinguished from merely charitable,

* meeting was held before the said Master, at which meet- * 200
 ing an offer to purchase the debt of 10,000*l.*, and interest
 and costs due to the examinant as official manager, and * to * 201
 take an assignment thereof for 7800*l.*, was submitted to the
 contributories of the railway company present at the meeting, and
 an order was made by the Master, with the approbation of the
 contributories, approving of the offer being accepted, and giving
 time to complete the sale of the debt. That on the 2d of Decem-
 ber, 1854, the purchase of the debt, interest, and costs was com-
 pleted by the payment of the 7800*l.* That on the 8th of December,
 1854, an order was made by the Lords Justices, annulling the

philosophical, scientific, literary, or other objects. That a company, the object of which was to facilitate the sale and interchange of commodities by navigation, whether maritime or inland, was especially one formed for a "commercial purpose." That it would be a very narrow construction of the words "commercial purpose" to apply it to the profit made by other elements in the price of an article, and not to apply it to the profit made by the transport, which might be the most important element. That the words in the Act had been applied by Lord COTTENHAM in *Barber's Case* (1 M. & G. 182), to a railway company, the purposes of which are certainly not more especially commercial than those of a canal. That they were similarly applied by the legislature in the 9 & 10 Vict. c. 28, § 23, which — by providing that at the meetings of railway companies, for which that Act provides, a declaration should be made whether the dissolution was or was not to be an act of bankruptcy, for the purpose of having the company wound up under the 7 & 8 Vict. c. 111 — must have assumed a railway company to be within the provisions of the last-mentioned Act. *M'Kay v. Rutherford* (6 E. F. Moore, 413) was also relied upon. For the company it was argued, that there was nothing which constituted either trade or commerce in constructing a canal on a company's own land and receiving toll for the use of it, and that if this was a commercial purpose the same description would apply to every turnpike trust. *Re Herne Bay Pier Company* (1 De Gex & Sm. 588) was also relied upon on behalf of the company, but with respect to this authority a distinction was, in the reply, insisted upon between the provisions of the Winding-up Acts, which give a discretionary jurisdiction, and those of the Bankrupt Acts, which have been held to be *ex debito justitiæ*.

The case was argued before the commissioner by *Mr. De Gex* for the petitioning creditor, and by *Mr. Motteram* for the company; and was afterwards argued on the appeal before the Lords Justices by *Mr. Bacon* and *Mr. Baggallay* for the appellants, and *Mr. Daniel* and *Mr. De Gex* for the respondents. As above stated, their Lordships reserved their judgment, which was rendered unnecessary by the purchase of the petitioning creditor's debt by a friendly creditor; the adjudication being subsequently annulled without opposi-
 tion.

adjudication of bankruptcy against the canal company. That on the 8th of November, 1854, Mr. Prichard had obtained an order from a Judge at chambers attaching all debts due and owing, or accruing due, from the canal company (the garnishees) to the official manager, to answer the judgment recovered by Mr. Prichard against the official manager. That on the 2d of December, 1854, the Master directed the examinant to discharge the judgment debt and interest due to Mr. Prichard by payment into the Court of Common Pleas under the order of the 8th of November, 1854, 3660*l.* 15*s.*, in satisfaction of the judgment debt. He then stated that the amount of call which would be necessary to supply and bring in the whole sum for the time being intended to be raised for payment of the debts already proved as aforesaid, and the costs, charges, and expenses incurred in the winding up of the said company to the present time, would be the respective sums of 15*s.* 8*d.* per share for debts and 4*s.* 4*d.* per share for costs, making together 1*l.* per share.

The Master thereupon made a call of 1*l.* per share, and it was from the refusal of the Vice-Chancellor to disturb the order for this call that the present appeal was brought.

* 202 * *Mr. Malins, Mr. Cole, and Mr. Waley*, in support of the appeal. — Under the 83d section of the Winding-up Acts the contributories are not liable to this call for debts, because that section gives power to make a call only so far as the contributories may be liable at law or in equity. But the shareholders, in this case, are not liable at law or in equity to the creditors of the company, — not at law since they have entered into no contract with the creditors, nor in equity because the covenant contained in the subscribers' agreement, which has been so much relied upon in this case, (*a*) is a covenant of indemnity only to the directors, and much more money has been paid into their hands than was required for their indemnity. This point was argued very fully before the then Lords Justices, on the last occasion, when this case was before them; but their Lordships said it was a point of great importance, and declined to decide it, as it was not then necessary so to do. It is perfectly clear that, as between the appellants and the creditors, with not one of whom the appellants

(*a*) Set out *ante*, Vol. I. p. 348.

ever contracted, the appellants have incurred no liability. If the directors had not been supplied with funds, it is possible that had they become liable at law to parties whom they had employed in the due discharge of their duties, this Court, to avoid circuitry, might have directed a call in the first instance for payment of the debts. But, according to the actual facts, if the managing committee had been sued, and, having paid, had proceeded against the appellants upon the covenant in the subscription contract, the appellants would have had an answer to the action in the fact of sufficient money having been received by the directors and having been misappropriated, as to 10,000*l.* in the purchase of a canal, and as to 2195*l.* in jobbing in shares. It is true that, as between the * official manager and the managing committee, there has * 203 been the compromise sanctioned by the order of the 21st of February, 1853. But the terms of the compromise do not entitle the directors to call upon the subscribers without recouping the misappropriated sums to the estate. And as the covenant is one of indemnity, it is only when the directors have completely performed the trust which was vested in them—that is, the trust to pay, out of the moneys in their hands, the engineers and other persons employed—that they can claim under the covenant. The appellants and other subscribers have already contributed much more than sufficient to pay all these sums if the money had been properly applied. The Lords Justices, on the former occasion, would not, as has been said, decide the question as to debts. All that their Lordships decided was as to a call for costs. Lord CRANWORTH there said, “Whether this is or is not the true effect of the deed, it is not necessary for us to decide, for the question here is not a question with creditors, but a question as to how funds are to be procured for enabling the official manager to proceed in the discharge of his duties in winding up the affairs of this unformed company. Now, though this company never was completely formed, yet in considering who are the parties who ought to contribute to the costs of winding up its concerns, it cannot escape notice that the persons on whom the call is made, namely, those who have executed the deed, are precisely those who will be benefited by the winding up, and will be benefited in the exact proportion in which they are called on to contribute, subject to any equities hereafter to be enforced among themselves.”

- They referred to *Carew's Case* (No. 2) (a), *Prichard's*
 * 204 * *Case*, (b) *Gay's Case*, (c) *Bright v. Hutton*, (d) *Mowatt*
and Elliott's Case. (e)

Mr. Selwyn, and *Mr. Roxburgh*, for the official manager. — We submit that the covenant in the subscribers' agreement is not a covenant of indemnity at all. It is a simple covenant that the subscribers will pay all the expenses of every description ratably in proportion to the shares. Every one of these contributories has executed this deed, and has come under that obligation, and the question now is whether it is to be discharged or not. It may be true that at law a creditor could not sue them, but it is not the less a legal liability among themselves. It is a liability by which they are bound, — a liability both at law and in equity, and the only point which has been argued is in substance who would be the proper person to be the plaintiff at law, which is a point in this Court quite immaterial. The objection which is taken is one which would involve going into the whole of this winding up from beginning to end. It in fact impugns the admission of the proofs of debts as debts against the company. It also disturbs what has been settled between the directors and the company. Take, for instance, the question about rigging the market. The official manager felt it was his duty, as representing the general body of contributories, to bring in a charge against the directors which included every sum that they had received. That was proceeded upon by the official manager as representing all the contributories.

Is all that to be re-opened ?

- * 205 * As to the 10,000*l.*, the inquiry was prosecuted, and ultimately it was seen that it would be for the advantage of all parties that, instead of getting an hostile order against the directors for payment of 10,000*l.* and interest, proceedings should be taken against the canal companies. With respect to the other part of the case, it was discovered that only some directors could be made liable to pay, and that they were in a state of insolvency, and therefore it was that a compromise was agreed to with the

(a) 7 De G., M. & G. 43.

(b) 4 De G. & Sm. 328; 5 De G., M. & G. 484.

(c) 5 De G. & Sm. 122; 1 De G., M. & G. 347.

(d) 3 H. L. Cas. 341.

(e) 3 De G., M. & G. 254.

sanction of all the contributories, in respect of which the directors paid 1000*l*. If the Court is now to entertain this claim and say that it will not allow the debts of this company, which have been proved to be paid, it will be in effect disturbing the settlement that has been come to. The claim against these directors was for two sums: one in respect of rigging the market, and the other in respect of the canal. The one has been settled by the compromise before the Master, and cannot be opened, the other was settled by the Vice-Chancellor, who dismissed the bill as against the directors, and gave them their costs out of the estate. His Honor's decision has not been questioned in this respect, and has been wholly affirmed upon appeal.

THE LORD JUSTICE KNIGHT BRUCE. — The principal or the only question before the Court is, whether the debts proved against this association in the Master's office ought to remain unpaid, or ought to be paid by the managing committee exclusively; or ought to be paid as the Master and Vice-Chancellor have decided by all the contributories ratably.

The first alternative is out of the question. The debts which have been proved must be provided for. Are they then to be paid by the managing committee alone? It *has been *206 contended that they are: first, because the members of the committee received sums for which they have not accounted; and, secondly, because these members alone contracted the debts. The first of these grounds, however, is removed entirely by the evidence. It appears that the managing committee have come to a settlement with the official manager in respect of the total sum for which they were liable to account; that is to say, for 28,000*l*.

With regard to the question as to the direct liability of the shareholders at large to creditors, that is a point upon which I do not think it necessary to give an opinion. It is sufficient to be satisfied that the creditors had a claim upon the managing committee, that the debts were incurred by the committee in the proper prosecution of the designs of the association, and that, to the extent of the call, the subscribers were bound to contribute with the managing committee to the expenses of the undertaking. I think, therefore, that the call was right with respect to the debts, and, if so, it is also right as to the costs.

The Lord Justice TURNER concurred.

1855. April 19. Before the LORDS JUSTICES.

A testator devised lands to a married woman for life, with remainder to her son C. D. and his assigns for life ("he or they" not committing waste), with remainder to trustees to preserve contingent remainders, with remainders to the first and other sons of C. D. successively, with remainders over, and a proviso that the person or persons entitled in possession should with "his or their" family or families while "he or they" should continue so entitled, reside at the mansion-house, and make it "his or their" principal place of abode, or in default thereof, that the devise to "him and them" should cease, but not so as to prevent the remainders limited to "his or their" son or sons from taking effect, the testator declaring that the limitations to trustees to preserve contingent remainders should take effect after any cesser for non-compliance with the condition. The testator gave the residue of his personal estate to trustees, to be invested in the purchase of lands to be settled to the uses of the devised lands.

Held, that the proviso as to residence applied to the married woman, and was sufficiently distinct to create a forfeiture on her refusing to reside after she became a widow.

Held, also, that the Court could not direct a portion of the residuary personal estate to be applied in improving the mansion-house.¹

THESE were two appeals from a decision of Vice-Chancellor STUART, reported in the 3d volume of Messrs. Smale and Giffard's Reports, (a) upon the construction and effect of the will of James Amphlett Grove, dated the 3d of May, 1842, whereby he devised lands to trustees and their heirs, to the use of Ann, the wife of Thomas Dunne, and her assigns for her life, and after her decease to the use of Charles Dunne (the youngest son of the said Thomas Dunne and Ann his wife), and the assigns of the said Charles Dunne for his life, he and they not committing any waste by felling any of the timber or trees growing on the devised estates, nor by suffering the several messuages, buildings, pleasure-ground, and premises to go out of repair, and from and after the determination of that estate by forfeiture or otherwise to the use of Thomas Dunne, James Milnes, and William Grove, and the survivors and survivor of them, his heirs and assigns, during the life

(a) Page 22.

¹ See *Lewin Trusts* (5th Eng. ed.), 416, 417.

of Charles Dunne, upon trust to support the contingent
 *uses and estates thereafter limited from being destroyed, * 208
 and from and immediately after the decease of Charles
 Dunne to the use of the first and every other son of Charles Dunne
 successively in tail general, with similar remainders to the use of
 Thomas Dunne (the eldest son of the aforesaid Thomas Dunne
 and Ann his wife) for life, with remainders in tail and ulterior limi-
 tations for life and in tail successively, with the interposition of
 limitations to trustees during the lives of the tenants for life to
 support the subsequent contingent uses, with an ultimate re-
 mainder to the testator's right heirs; and the will contained a
 name and arms clause, which was expressly made applicable to all
 and every the person and persons to whose use the estates were
 by the will devised or limited "in remainder from and after the
 decease of Ann Dunne." It also contained a proviso, which was
 as follows: "Provided always, and my will is, that all and every
 the person or persons, who by virtue of the several devises and
 limitations hereinbefore contained, or of this proviso, shall become
 entitled to the possession of the several messuages, lands, and
 other hereditaments hereinbefore by me devised in strict settle-
 ment as aforesaid, and shall be of the age of twenty-one years or
 upwards, do and shall, with his or their family or families, after
 becoming and while he or they shall continue so entitled, reside
 and dwell in my said capital messuage or mansion-house at the
 Four Ashes aforesaid, and make the same premises his or their
 principal place of abode; and that in case any such person or per-
 sons shall refuse or neglect to, or shall discontinue to, reside and
 dwell at my said capital messuage or mansion-house at the Four
 Ashes aforesaid, then and in every such case and from thenceforth
 the devise and limitation or devises and limitations hereinbefore
 made and continued to him or them who shall so refuse, neglect,
 or discontinue, of and concerning the messuages, lands,
 and other hereditaments * hereby devised in strict settle- * 209
 ment as aforesaid, shall cease, determine, and become ut-
 terly void, and all the same messuages, lands, and other heredita-
 ments shall in such case immediately thereupon go to the next
 person in remainder under the devises and limitations by me here-
 inbefore made thereof, in the same manner as if the person or
 persons being tenant or tenants for life was or were actually dead,
 or being a tenant or tenants in tail was or were dead, without

having any heir or issue inheritable to the estate tail then vested in the person or persons who shall so refuse, neglect, or discontinue to make such residence as aforesaid; and provided also, that any such cessation or determination of the estate of any tenant for life shall not operate to exclude, prevent, destroy, or prejudice any of the contingent remainders hereinbefore limited to his or their son or sons, or other person or persons, but that the remainders limited to the said Thomas Dunne the elder, James Milnes, and William Grove, and their heirs, during the lives of such tenant for life, shall after such cessation or determination take effect and continue for preserving such contingent remainders, and giving them effect as they shall arise, and that such trustees and their heirs shall after such cessation or determination of any such estate for life, and during the suspension or contingency of any then next expectant remainder, but no longer, receive, pay, and apply the rents and profits of the same estates which would belong to such tenant for life, if such cessation or determination had not taken place, unto such person or persons, or for such intents and purposes, and in the same manner as under and by virtue of the limitations and provisos of this my will the same would be payable and applicable in case such tenant for life were actually dead." The will also contained a bequest of the testator's

general personal estate, upon trust for investment in the
 * 210 purchase of freeholds, to be settled to the same * uses as were by the will limited of and concerning the hereditaments thereby devised in strict settlement, or as near thereto as circumstances would admit.

The testator died on the 26th of May, 1854, and Thomas Dunne died shortly afterwards. Ann Dunne did not go to reside at the mansion, and she admitted by her counsel that she did not intend to reside there.

Charles Dunne instituted the present suit by claim, seeking thereby a declaration that the proviso as to residence applied to his mother Ann Dunne, and that, in consequence of her refusal to reside, the devise to her had ceased, and that the plaintiff was now entitled as tenant in possession, and also claiming to have an inquiry whether it would be expedient and proper that a sum of money should be raised out of the residuary personal estate, and expended in improving the mansion-house (which the claim stated to be unfit for the residence of a person possessing the income of

the testator's real and residuary personal estate), and to have such improvements made at the cost of the residuary personal estate.

By the order under appeal, after noticing that Ann Dunne by her counsel admitted that she had not resided and did not intend to reside in the mansion-house, it was declared that, according to the true construction of the will, Mrs. Dunne had forfeited her life estate; and it was ordered, that so much of the claim as sought the inquiry as to raising money out of the personal estate to be expended in improving the mansion-house, and to have the cost thereof defrayed out of the personal estate, should be dismissed. Both parties, viz., Mrs. Dunne and the plaintiff, appealed from this decision.

On the former appeal, * *Mr. Malins* and *Mr. Berkeley*, for * 211 Mrs. Dunne. — The expression "principal residence" is too vague to enable the Court to enforce the proviso, more especially as it is one of forfeiture. But even if the clause were sufficiently definite, the careful avoidance of the feminine pronoun shows that the testator did not intend the proviso to apply to the widow. This is made still more clear by the reference to the limitation to the trustees to preserve contingent remainders.

The forfeiture clause provides, that upon its coming into operation the limitation to the trustees to preserve contingent remainders shall take effect, so that it could not have been intended to operate upon a limitation, which was not followed by one to the trustees to preserve contingent remainders. These considerations show clearly the intention of the testator to be that for which we contend; but every probability is also in its favour, for what could be less likely or just than that the testator should make a benefit given to a married woman depend upon her residence at a particular place, — a condition not in her power to fulfil. The testator not only knew that Mrs. Dunne was a married woman, but knew also that her husband had his own family seat, where he would require her to reside.

They referred to *Fillingham v. Bromley*, (a) *Sergison v. Adey*, (b) *Walcot v. Botfield*. (c)

(a) Turn. & Russ. 530.

(b) Before V. C. TURNER, in 1851, not reported.

(c) Kay, 534.

Mr. Bacon and Mr. J. W. Smith, for the respondents.

THE LORD JUSTICE KNIGHT BRUCE. — We do not doubt
 * 212 that if the clause was intended to * apply to Mrs. Dunne, it
 has been violated. It appears to us sufficiently definite and
 intelligible. It is unnecessary to say how the case would have
 stood had she continued a married woman, for she has long been
 a widow.

THE LORD JUSTICE TURNER. — However the case might have
 stood had the word “reside” alone been used, the words “reside
 and dwell” are quite sufficiently certain to create a forfeiture as
 against a person who states that she never has resided and does
 not intend ever to reside at the mansion. The respondents may
 confine their arguments to the question whether the proviso is
 applicable to Mrs. Dunne.

Mr. Bacon and Mr. J. W. Smith, for the plaintiff, and *Mr. Craig*
 and *Mr. Pownall*, for Thomas Dunne, the second tenant for life. —
 With respect to the omission of the feminine pronoun we submit
 that it is altogether an insufficient foundation for the inference
 which the appellants draw from it; for the husband and wife are
 both mentioned, and the use of the plural pronoun, if not more
 correct than that of the singular, to designate the ownership of
 Mrs. Dunne’s estate, is quite as correct. It would also be too
 much to infer from the reference to the limitation to the trustees
 to preserve that the forfeiture clause was only to operate where
 that limitation followed the estate forfeited, there being no such
 restriction placed upon its operation by the words of the will.
 Where the testator meant to exempt Mrs. Dunne from the opera-
 tion of a shifting clause, he has done so as in the name and arms
 clause.

THE LORD JUSTICE KNIGHT BRUCE. — I agree with the
 * 213 Vice-Chancellor. I am of opinion * that the clause of for-
 feiture applies to Mrs. Dunne as well as to the other tenants
 for life, and that the reference to the trustees to preserve contin-
 gent remainders, and the use of the masculine singular and the
 plural pronouns, without using the feminine singular, do not afford
 sufficient grounds for a contrary decision.

THE LORD JUSTICE TURNER. — My opinion is not so confident on this point as that of my learned brother, but, whatever conjectures I may have formed as to the intentions of the testator, there does not appear to me enough foundation for a judicial conclusion that the clause of forfeiture does not apply to Mrs. Dunne. I think that the word "their" distinguishes the case from *Sergison v. Adey*, and is sufficient to include every person becoming entitled. I think that the reference to the limitation to the trustees to preserve does not furnish sufficient ground for the inference that there was to be no determination of the life-estate, except where an estate was limited to those trustees.

On the second appeal, —

Mr. Bacon and *Mr. J. W. Smith*, for the appellant Charles Dunne. — This is a case not of repairs but of lasting improvements, as to which the Court has jurisdiction. *Hibbert v. Cooke*, (a) *Lombe v. Stoughton*. (b) At all events the personal estate might be applied as sought under the power to invest it on real estate.

[THE LORD JUSTICE KNIGHT BRUCE. — Would there not be some difficulty in making out that an addition of a new wing to an old *house is a purchase of real estate?] * 214

We submit that it would be a fair operation to give to the clause. The only ground upon which, before the Wills Act came into operation, a direction to pay a gross sum was held to enlarge an indefinite devise into a fee was, that otherwise the devise might confer a "*damnosa hereditas*." So here, unless the construction which we propose is put on the clause, the devise will confer a *damnosa hereditas*.

THE LORD JUSTICE KNIGHT BRUCE. — This must be done, if at all, by an Act of Parliament.

The Lord Justice TURNER concurred.

Appeals dismissed.

(a) 1 Sim. & St. 552.

(b) 17 Sim. 84.

MORISON v. MORISON, and several other Causes.

1855. April 20. Before the LORDS JUSTICES.

West India estates were devised upon trust for sale and distribution of the proceeds among the testator's children absolutely. In a suit for the administration of the trusts consignees were appointed, and pending the suit settlements were made of the children's shares, by which interests for life and in reversion were limited. In making payments which had been sanctioned by the Court, the consignees became in advance to the trust estate: *Held*, that these advances were a charge upon the *corpus* of the trust estate.¹

THIS was an appeal from a decision of Vice-Chancellor STUART, reported in the 2d volume of Messrs. Smale & Giffard's Reports. (a) The case is reported also on another point in the 4th volume of Messrs. Mylne & Craig's Reports, (b) and * 215 from the above reports, * and the briefs on the present appeal, the following statement is compiled.

George Morison (the father of the plaintiffs in the original cause) conveyed, by a deed of settlement, dated May 28th, 1813, certain plantations, slaves, and hereditaments in the West Indies to trustees upon trust, as soon as might be after his decease, absolutely to sell and dispose of the plantations, slaves, hereditaments, and premises, and to invest the money to arise from such sale or sales in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England or in the West Indies, in trust for his children the original plaintiffs, their respective executors, administrators, and assigns, to be divided between them in equal shares and proportions, their respective shares to become vested interests in them respectively, upon their respectively attaining the age of twenty-one years, or being married, which should first happen.

The settlor died on the 16th of December, 1814, having by his will devised to trustees all his real and personal estates and effects of what kind soever, in the West Indies and in Great Britain or elsewhere, not otherwise disposed of by that his will, upon trust,

(a) Page 564.

(b) Page 215.

¹ See *Ex parte* James, 1 D. & C. 272; *Norwich Yarn Co.*, 22 Beav. 143; *Ex parte* Chippendale, 4 De G., M. & G. 19; *Perry Trusts*, § 910, and cases in note (5).

with all convenient speed after his decease, to call in and convert into money his personal estate, or such part thereof as should not consist of money, and at their or his discretion to sell and dispose of his freehold, leasehold, and real estates, and to stand possessed of the sum or sums of money to come to their hands, by the ways and means thereinbefore mentioned, upon trust, after payment of his debts, funeral and testamentary expenses and legacies, to lay out and invest the residue in the parliamentary stocks or public funds of * Great Britain, or at interest upon govern- * 216 ment or real securities in England, and out of the dividends to pay to Eleanor Irvine, the plaintiff's mother, and her assigns, an annuity of 200*l.* for her life; and, subject thereto, to stand possessed of and interested in the same trust moneys, stocks, funds, and securities, and the interest, dividends, and produce thereof, in trust for the female plaintiffs when and as they should respectively attain the age of twenty-one years, or marry under that age with the consent of the trustees or trustee, and for the male plaintiff when and as he should attain his age of twenty-one years, to be divided among the plaintiffs in equal shares and proportions.

In the month of February, 1815, the original bill was filed, all the children, five in number, being co-plaintiffs by their next friend.

It prayed for accounts of the rents and profits of the settled and devised estates received by the trustees of the settlement and will, and that all the real estates conveyed by the settlement, and devised by the will, might be decreed to be sold, and that all the personal estate and effects assigned by the settlement, or bequeathed by the will, might be sold and converted into money, and that the money arising from all such sales might be respectively applied according to the respective trusts of the settlement and will; and for a receiver; and that the Master might be directed in taking the aforesaid accounts to make all proper allowances to such of the defendants as should appear to have acted as consignees of the proceeds or produce of the said plantations and estates, and that all proper and further directions might be given for the performing of the trusts of the settlement and will.

* In March, 1817, the original decree was pronounced. It * 217 directed that the usual accounts should be taken, and contained a direction that the Master should appoint a proper person or persons to be a consignee or consignees of the rents and profits of the

testator's West India estates, and make him or them a proper allowance in respect thereof, and that any of the parties should be at liberty to propose the defendants, the executors, or any of them, or any house of trade to which they or he might belong, to be such consignees or consignee.

In March, 1817, the defendant Edward Ellice was appointed consignee under the decree. In the mean while, Martha Morison, one of the plaintiffs in the original cause, intermarried with William Wyllie the elder, and upon her marriage, which took place in the month of August, 1818, a settlement was made, of which Edward Ellice was named a trustee, and the principal object of which was to settle her share of whatever property might be coming to her under the deed and will, to her separate use for life, and after her death to her husband for life, with remainder to her children.

On the 16th of January, 1819, an order of revivor of the original suit was obtained. In the month of April, 1819, Magdalen Morison, one of the co-plaintiffs in the original bill, died an infant and unmarried.

In June, 1820, Mary Morison, another of the co-plaintiffs, being still under age, intermarried with Henry Dickinson, and on that occasion a settlement was executed.

In March, 1822, Martha Wyllie died, whereupon her husband became, under the marriage settlement, tenant for life of the
 * 218 proceeds of her share. In the month of * December, 1823, Mary Dickinson died leaving children, and on the 17th of December, 1825, a bill of revivor and supplement was filed by such of the original infant plaintiffs as were unmarried, by Mr. Wyllie and his children, and by Mr. Henry Dickinson and his children. That bill stated the marriages of Mr. and Mrs. Wyllie, and of Mr. and Mrs. Dickinson, and the settlements executed on the occasion of those respective marriages, and that upon Mrs. Wyllie's marriage the suit had been revived, and it prayed the benefit of the original decree pronounced in the year 1817.

In May, 1827, the cause came on for further directions upon the Master's general report, when a decree was made in all the suits, which among other things directed that Edward Ellice should be continued as consignee.

In the year 1830, Mr. Ellice presented a petition, praying that he might no longer act as consignee, and upon that application an

order was made for the appointment of another consignee, and discharging Mr. Ellice; and it was ordered, that he should pass his final account before the Master, with liberty to apply respecting any balance which might be found due to him on passing his accounts.

By an order of the 10th of March, 1837, it was ordered, that the accountant-general should be at liberty to transfer the amount of compensation money awarded in respect of the slaves on the several estates, to accounts respectively entitled "the accounts of the compensation money in respect of the slaves on the respective estates;" and that such transfer should be without prejudice to the rights and claims of any persons respectively interested therein, and that the interest to * accrue due on such sums, * 219 and its accumulations, should be invested in trust to the like accounts respectively.

By a report made on the 7th of May, 1842, the Master allowed the account of Mr. Edward Ellice, and found that there was a balance of 5335*l.* 8*s.* 7*d.* due to him on passing his accounts.

On the 11th of February, 1841, Mr. George Forsyth, another of the respondents, was appointed under an order of the Court, to be consignee of the estate and plantations, and he from time to time passed his accounts. On the 24th of April, 1854, the Master certified that the sum of 32,815*l.* 17*s.* 3*d.* was due to him in respect of all the estates of the testator up to the 30th of April, 1852.

The Master afterwards made his general report, dated the 2d of May, 1854, finding 18,343*l.* 3*s.* to be due to a mortgagee of one of the estates, and submitting to the judgment of the Court, whether this mortgage was or was not a first charge or incumbrance upon and payable out of the estate.

On the cause coming on for hearing upon exceptions to the Master's report, and, upon further directions, three petitions were ordered to be heard at the same time.

The first of these petitions was that of Mr. Edward Ellice, praying for payment of the balance found due to him by the Master's report, with subsequent interest.

The second petition was that of Mr. Forsyth, praying for repayment of the amount of his advances.

The third petition was that of the mortgagee seeking * payment of the amount due on the mortgage, in pri- * 220

ority to Mr. Edward Ellice and Mr. George Forsyth, the consignees.

The Vice-Chancellor held, that the sums found due to the consignees ought to be paid out of the principal of the compensation moneys, and were so payable in priority to the mortgage, and made an order accordingly.

Against this order the children of Mrs. Wyllie appealed.

Mr. Giffard and *Mr. Cracknell*, for the appellants. — We submit that neither Mr. Ellice nor Mr. Forsyth is entitled to be paid out of the *corpus* of the estate. The reversioners were excluded by the Master from attending when the consignees' accounts were passed, and cannot therefore be bound by them. The case does not at all resemble *Re Tharp*, (a) to which it was likened in the argument below. The circumstance of the lunacy in that case constitutes an essential distinction. In this case the consignees have actually been allowed sums paid to the tenants for life, and yet they seek to charge the *corpus*, which has never been represented before the Master when the accounts were taken.

Consignees are bound to confine the expenses of management within the income, and if the reversioners had been allowed to attend before the Master the excess would not have been allowed.

They commented upon *Scott v. Nesbitt*, (b) *Ex parte Pol-lard*, (c) and *Shaw v. Simpson*. (d)

* 221 * *Mr. Wigram* and *Mr. Wickens*, for Mr. Ellice and Mr. Forsyth. — The appellants' documents show that the payments made by the consignees for the maintenance of the trust estate far exceeded their gross receipts. They made the payments on various accounts, and the balance does not arise from payments made to the tenants for life. With respect to Mr. Ellice, he must be repaid the balance which has been found due to him. If the appellants were improperly excluded from being present when the accounts were taken, they ought to have objected at the time; not having done so, and being parties to the cause, they are bound. Mr. Ellice's disbursements arise in great part from the sums expended in maintaining the slaves and keeping up

(a) 2 Sm. & G. 578, n.

(c) 4 Dea. 275.

(b) 14 Ves. 438.

(d) 1 Y. & C. C. C. 734.

the estate. Although the right of consignees of West India estates to payment out of the *corpus* of the estate has never been actually settled by decision, there is authority in its favour. *Scott v. Nesbitt*, (a) *Sayer v. Whitfield*, (b) *Farquharson v. Balfour*, (c) *Shaw v. Simpson* (d) and *Re Tharp*. (e) Suppose the expenditure had been made by the trustees, they would have been entitled to be recouped out of the whole trust estate, and not out of the income merely. With respect to Mr. Forsyth, he succeeded to Mr. Ellice, and was entitled to consider that the claims of both would be treated in the same way. His appointment was a continuation of the former, and his acts were those of the Court, which acted as the trustee of the estates, and must have had a right to charge the estates with the expenses incurred in the execution of the trust. But if Mr. Forsyth has not a claim on the *corpus*, and Mr. Ellice has, the result would be the same, since the funds would be marshalled, *and Mr. Ellice's * 222 claim would be thrown on the *corpus* entirely, so as to leave the income for Mr. Forsyth. The trust property is to be treated as one estate, and if any part of it is not sufficient to pay the charges of executing the trusts affecting that part, the whole estate is liable to make them good. If a trust estate consisted of realty and money, the trustee could resort to the latter portion of the estate to repay the expenses of managing the former.

[THE LORD JUSTICE KNIGHT BRUCE. — Why were not estates, from which nothing but loss accrued, abandoned?]

The parties and the Court have been always anticipating that the estates would become profitable. Even admitting that if there had been no trust for sale in the present case, the claim of the consignees would have been difficult to maintain, still that trust relieves them from the difficulty, for the expenses have been incurred in maintaining the estates with the view of making an advantageous sale, and of executing the trust, and are therefore on this account alone properly payable out of the *corpus*.

Mr. Bacon, *Mr. Malins*, and *Mr. W. Bovill* appeared for other parties.

(a) 14 Ves. 438.

(b) 1 Knapp, 149.

(c) 8 Sim. 210.

(d) 1 Y. & C. C. C. 732.

(e) 2 Sm. & G. 578, n.

Mr. Cracknell, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The principles (as far as there are any), and the authorities peculiarly applicable to estates in the West Indies, have, as it appears to me, little in common with the present case, which, in my opinion, must be decided on general, and perhaps universally applicable, principles.

The position of the estates to which the argument * 223 * relates, was, at the time of the institution of the suit, this: They were under an absolute trust for sale. The trustees had a discretion as to postponing the sale, and there was a limited time beyond which as to part of the property the sale was not to be postponed. In the view of this Court the property was merely personalty, inasmuch as its ultimate shape was to be money, and its value was only so much as it would bring. At the time of the institution of the suit there was not even a tenancy for life, and it is only by subsequent settlements and acts that tenancies for life, subject to and under the trusts, have been created. In the suit receivers were appointed, who also, owing to the nature of the property, became consignees, and every act done by them was an act in the administration of an ordinary trust with respect to money existing at the time not in the shape of money, but in the shape of the investment in which the money was temporarily lodged. Every act done by them was done with a view to the safety and protection of a fund, which was to be considered as money. The Court may have miscarried in the discharge of its duty as trustee of the fund, or of its office of directing or regulating the conduct of the trustees; but it appears to have done its best, and if it had not all the assistance which it might have had from the parties, it is not to blame on that account. But whether it is to blame or not, it has sanctioned a series of payments made by the receivers or consignees as servants of the Court for the time being, and a servant or agent of the Court, not affected with fraud or improper conduct, is not answerable for the wisdom, correctness, or propriety of the orders which he receives, or for the directions by which his acts are sanctioned.¹

Here there is no reason to doubt the good faith of the con-

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1715.

signees. They have been directed to make, or been * sanctioned in making, certain payments, and it is too late * 224 to go back and inquire as to the propriety of those payments. The blame, if any, which attaches to the Court is not material. The question is, What is to be allowed to the servants of the Court in respect of payments made by them ?

These payments must be looked upon as payments made in the proper administration of the trust, for the protection and preservation of that which was to be protected and preserved until it should be converted into money. They must be treated as having been in the execution of a money trust, and it is impossible to permit the trust property to be enjoyed by any persons claiming beneficially under the trust without making good the expenditure and advances *bonâ fide* made in the execution of the trust under the authority of the Court, whose duty it was to direct how the trusts were to be executed. It seems to me that what has been done cannot be disturbed.

THE LORD JUSTICE TURNER. — If I had been required in this case to give an opinion on the general question as to the lien of a consignee of a West India estate, on the *corpus* of the estate, I should have desired time for consideration, for I confess that, often as I have considered that question, my mind has never been made up upon it.

This case, however, does not appear to me to involve that question. There are two points in it, — one as to the balance due to Mr. Ellice down to 1841, and the other as to the balance due to Mr. Forsyth. The objections to the allowance of these balances rest on different grounds.

* The objection urged against the claim of Mr. Ellice is, * 225 that the sums allowed consist in part of sums which were ordered to be paid and have been paid to the tenants for life of the property, and that as to these sums there could be no lien on the *corpus*. The first answer to this objection is, that the accounts of Mr. Ellice were passed in the Master's office till 1830, when Mr. Ellice was discharged from the receivership, with liberty to apply as to the balance due to him, and that the attempt now made to dispute that balance is, in fact, an attempt to open all those accounts which were passed and settled in 1830. It is objected, however, that the persons interested in the *corpus* were not allowed

to attend when those accounts were passed. It may have been so, but I do not think that they can on this ground apply to the Court at any distance of time to open the accounts. If it was wrong to direct the accounts to be taken without their attendance, they ought at that time to have had the matter set right. Independently, however, of the length of time which has elapsed, the payments have been allowed by the Court itself, and, therefore, if there has been a breach of duty, it has arisen from the act of the Court, and not from that of its officer. The officer cannot be left without indemnity in respect of his acts, unless they have not been warranted by the orders of the Court. I think that here the consignees were well warranted in making the payments, and therefore, without reference to any rights peculiar to a consignee, and independently of the general question as to such rights, Mr. Ellice's balance must be paid out of the compensation money.

The objection taken to Mr. Forsyth's claim is, that in 1837, four years before he became consignee, the compensation moneys were severed from the rest of the estate and paid into Court, and that

he, therefore, could have no lien upon them. That is one
 * 226 view of the case, but it * is a partial view. The Court has represented the whole estate, and has stood in the position of a trustee of it, and the consignee was the paid agent of the Court to manage the estate which was in the Court's hands. The moneys due to the consignee are moneys due to the Court itself, and as the Court has in its hands moneys belonging to the estate, on account of which it has made the payments, it must have a right to repay itself its advances out of these moneys. This right has priority over the costs of suit, for as to a fund in the hands of a trustee, his expenses must be the first charge on the fund.

These grounds seem to me to free the case entirely from the general question of the lien of a consignee of a West India estate.

The appeal must be dismissed, but without costs.

* YEATES v. ROBERTS.

* 227

1855. May 24. Before the LORDS JUSTICES.

A district Odd Fellows society, after expelling a lodge of the society for non-payment of subscriptions and fines, was registered as a friendly society pursuant to the 13 & 14 Vict. c. 115, under a name which, upon an objection of the certifying barrister, was altered from the original name. Some deposit notes of a banker's with whom a portion of the subscriptions were deposited, remained in the hands of the grand master of the expelled lodge, and were demanded from him by the trustees of the registered society: *Held*, that, whether the expulsion of the lodge had been proper or not, he was bound to deliver up the notes to the trustees, and he was ordered to pay the costs of a suit instituted by the trustees against him for their recovery.

THIS was an appeal from a decision of Vice-Chancellor KINDERSLEY, ordering the defendant, a member of a friendly society, to deliver up to the plaintiffs, as trustees of the society, certain deposit notes, which he had withheld from them, disputing their title.

The defendant had been a member of a lodge, called the "Briton's Lion" Lodge of "the Birmingham District of the original Wolverhampton Order of Odd Fellows," and had been on the 9th of April, 1840, appointed grand master of the district society. Contributions were paid by the members of the district society, for the purpose of affording relief to the members in case of sickness and providing for the expenses of their funerals. Part of the funds had been deposited at a banker's on deposit notes, some of which were in the hands of the defendant.

Differences had arisen between the Briton's Lion Lodge and the rest of the district society, in consequence of which the members of the lodge declined continuing their contributions, and a resolution of the district society was passed expelling the lodge. In February, 1852, after their expulsion, the district society was registered as a friendly society under the 13 & 14 Vict. c. 115. Mr. Tidd Pratt, the barrister appointed * under the Act, * 228 having objected to the name of the society, it was abbreviated, and the society was registered under a different name.

The registered society then applied to the defendant to deliver up the deposit notes, and on his refusal the trustees of the society

instituted the present suit, which was heard by the Vice-Chancellor on a motion for a decree.

The case is reported below in the 3d volume of Mr. Drewry's Reports, (a) where the facts are fully stated.

Mr. Selwyn and *Mr. Osler*, for the plaintiffs.

Mr. Glasse and *Mr. Pownall*, for the defendant. — The same arguments and authorities were adduced as were relied upon before the Vice-Chancellor.

THE LORD JUSTICE TURNER. — It appears that this district society was divided in opinion, one part taking one view and one another. The documents in question, however, were intrusted to the defendant for the purposes of the society. Then the society was registered; the consequence of which proceeding was, that, according to the provisions of the Act of Parliament, all the property of the society became vested in its trustees. The defendant insists that the registered society is not the district society, inasmuch as one of its lodges had been expelled. If, however, the lodge was lawfully expelled, there is an end of all question.

* 229 And if it was not lawfully expelled, either the * members of it can enforce their restoration to the society, or the law is defective in not providing a remedy for that wrong. Still the property of the society must be delivered to the trustees who are appointed by law to hold it. With respect to the alleged alteration, it appears to have been one in name only. I think, therefore, that the decree is right.

THE LORD JUSTICE KNIGHT BRUCE. — The appeal is dismissed with costs.

(a) Page 170.

HUGHES v. PARAMORE.

1855. April 24. Before the LORDS JUSTICES.

One of two persons who had dealings together and were mutually indebted to one another, had supplied some bricks on the credit of the other in 1834, but no account had been delivered or made out on either side. In 1845 they signed in duplicate a memorandum thus expressed: "It is agreed that Mr. R., in his general account, shall give credit to Dr. H. for 174*l.*, being for bricks delivered in 1834:" *Held*, that this was insufficient to exclude the mutual debts from the operation of the Statute of Limitations.¹

THIS was an appeal from the decision of Vice-Chancellor STUART, allowing exceptions to the Master's report, on the ground that there had been a sufficient acknowledgment to take out of the Statute of Limitations a claim disallowed by the Master as barred by that statute.

The suit was an ordinary one for the administration of the estate of Dr. Hughes, the testator in the cause, and by the decree the usual inquiry had been directed as to the testator's debts.

Under this decree the respondent, who was a solicitor, went in before the Master and claimed to be a creditor of the testator upon a general account, which was as follows:—

¹ See Chitty Contr. (10th Am. ed.) 910, 911 and notes; *Ex parte Storer*, Davies, 294; Angell Limitations (4th ed.), §§ 143–151.

		JOHN HUGHES, Esq., M.D.		
1834.	Dr.	£	s.	d.
Jan. 1.	To amount of taxed costs in <i>Hughes v. Williams</i> received			
	by Mr. Evans, including <i>fi. fa.</i>	76	7	8
	Cr. By cash received out of Court	60	0	0
		16	7	8
	Costs of action, <i>Hughes v. Jones</i> and another, received by			
	Mr. Evans	12	10	0
1836.				
June 30.	Cash to Birchall & Marsh, Harper's assignees	20	0	0
1837.				
Oct. 27.	Mr. Toulmin, in <i>Hughes ats. Bates</i>	7	6	0
1839.				
July 2.	Cash to Mrs. Hughes	5	0	0
" 17.	" "	5	0	0
1840.				
April 9.	" "	5	0	0
Aug. 18.	" "	5	0	0
1841.				
Feb. 4.	" "	5	0	0
Aug. 19.	Rev. Robert Davies's balance, Hughes's note £205 19 6			
	By cash from you	50	0	0
		155	19	6
1842.				
June 1.	Mr. Ward, debt and costs in <i>Hughes ats.</i>			
	<i>Foulkes</i>	£50	0	0
	By cash from you	42	0	0
		8	0	0
Sept. 16.	Cash to Mrs. Wolseley	5	0	0
Oct. 12.	" "	5	0	0
" 28.	" "	5	0	0
1843.				
April 6.	" "	5	0	0
	Bills for business, No. 1 to 60 inclusive, and general bill			
	delivered to J. Hughes's executors	838	18	7
		£1104	1	9

To JOHN ROBINSON.

Cr.	£	s.	d.
By amount of bill for bricks delivered by you to the trustees of Park- Place Chapel	174	0	0
1835.			
Mar. 2. S. Colley	1	0	0
April 3. „	1	0	0
May 7. „	0	10	0
June 3. „	0	10	0
1838.			
Jan. 20. Alcock	4	13	4
1839.			
April 12. Troughton and another, for costs of writ	2	2	0
Oct. 2. Cash, balance of 140 <i>l.</i> 8 <i>s.</i> (see Dr. Hughes's letter of 28 Sept. 1839)	1	0	6
Dec. 31. Cash	1	15	0
1840.			
Aug. 19. Cash	1	6	3
1841.			
Aug. 17. Henry Yates	274	1	6
1843.			
Jan. 2. Dean's assignees' dividend for Hughes and Robinson	1	7	8
1844.			
July 5. Cash	16	18	0
1845.			
Mar. 10. By Mr. Hall	33	0	0
June 3. „ „	10	0	0

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* 232 * It appeared by the evidence that, prior to 1834, the respondent and the testator had been engaged in some building adventures, and that in 1834 the testator furnished some bricks to the trustees of a chapel in his neighbourhood, on the respondent agreeing to pay for them.

In 1845, the testator signed the following memorandum relating to this transaction: —

“ It is agreed that Mr. Robinson, in his general account, shall give credit to Dr. Hughes for 174*l.*, being for bricks delivered to the trustees of Park Place Chapel, Toxteth Park, in 1834. Dated the 5th of September, 1845.

“ JOHN HUGHES.”

A duplicate of this memorandum was signed by the respondent. The testator died in 1847.

No account had been delivered or made out between the respondent and the testator, but the above memorandum was relied upon by the respondent, as an acknowledgment in writing taking out of the Statute of Limitations all the intermediate debts.

The Master did not take this view of the case, and only allowed the debts which had accrued within six years prior to the testator's decease. Accordingly, by his separate report, dated the 3d of July, 1854, he found that there was due to the respondent from the estate of the testator, upon a balance of account for business done and money paid and expended as an attorney and solicitor, the sum of 279*l.* 1*s.* 4*d.*, and for * interest thereon at the rate of 4*l.* per cent per annum, from the 27th of February, 1850, to the 3d of July, 1854, the date of the report, after deducting income tax, the sum of 47*l.* 1*s.* 3*d.*, and for his costs of proof the sum of 25*l.* 18*s.*; and in ascertaining what was due to John Robinson, the Master stated by his report that he had disallowed all charges made by John Robinson, which bore date previously to the month of January, 1842.

The respondent, by leave of the Court, filed four exceptions to this report, all of which the Vice-Chancellor allowed.

The plaintiffs and defendants appealed.

Mr. Amphlett and *Mr. Rose*, for the appellants. — A mere ac-

knowledge is not sufficient to take the case out of the statute, unless a promise to pay can be inferred from it, and the Courts look at all the circumstances of the case to judge whether the acknowledgment was intended as a promise. The Act 9 Geo. 4, c. 14, requires the acknowledgment to be in writing, but does not otherwise vary the antecedent law. *Tanner v. Smart*, (a) *Smith v. Thorne*. (b) In *Gardner v. M' Mahon*, (c) an acknowledgment was held to take an account current out of the statute, but in that case the balance was admitted to be against the person making the acknowledgment.

[THE LORD JUSTICE KNIGHT BRUCE. — Had an account been delivered in this case when the memorandum was signed?]

No; and it would have been consistent with it, that a balance might have been due to Dr. Hughes. The memorandum was merely * intended to acknowledge that the bricks would * 234 be properly charged against Mr. Robinson. *Cheslyn v. Dalby*, (d) *Routledge v. Ramsay*, (e) *Waugh v. Cope*, (g) are also authorities in favour of the appellants.

It will, however, probably be argued that the value of the bricks, viz., 174*l.*, was such a part payment as to take the case out of the statute; but to have this effect, they must have been delivered as a part payment of a sum admitted to be due. *Tippets v. Heane*. (h)

They also referred to *Hart v. Pendergast*, (i) *Mills v. Fowkes*, (k) *Burn v. Boulton*, (l) *Cottam v. Partridge*. (m)

Mr. Wigram and *Mr. Charles Hall*, for the respondent. — The memorandum is an acknowledgment that the bricks were delivered as a part payment, and is sufficient to take the case out of the statute.

(a) 6 B. & C. 603.

(b) 21 Law J., Q. B. 199.

(c) 3 Q. B. 561.

(d) 4 Y. & C. 238.

(e) 8 A. & E. 221.

(g) 6 M. & W. 824.

(h) 1 C., M. & R. 252.

(i) 14 M. & W. 741.

(k) 5 Bing. N. C. 455.

(l) 2 C. B. 476.

(m) 4 M. & Gr. 271.

They referred to *Haydon v. Williams*, (a) *Ashby v. James*, (b) *Edmonds v. Goater*, (c) *Hooper v. Stephens*, (d) *Worthington v. Grimsditch*, (e) *Catling v. Skoulding*. (g)

Mr. Amphlett, in reply.

* 235 * THE LORD JUSTICE KNIGHT BRUCE. — With regard to the whole period of six years next before the testator's death, the counsel agreed that no question should be made, and the only point therefore for decision is as to the effect of the paper of the 5th of September, 1845.

It appears that when that paper was written, the position of Dr. Hughes and Mr. Robinson was this: They had been engaged in a joint undertaking or adventure connected with building, which had terminated in the year 1834, as I understand; that is to say, considerably more than six years before the date of the document. There had not therefore, within six years before it was signed, been any joint adventure or undertaking, or any connection in the nature of a partnership, between the two gentlemen. One was a solicitor, and the other a medical gentleman. Upon the dealings between them, it may safely be assumed, I think, that each was a debtor and each was a creditor. The great probability is also that the sums of debit and credit on each side were not so exactly even as not to leave, upon the ultimate balance, a sum due from one of them to the other, as the result of the accounts. But, at this period of 1845, no account had been rendered. There was nothing in the nature of an account between them, except that which was the necessary result of the position in which they stood towards each other, of each owing the other money as I have said.

It seems that a question had arisen between them respecting certain bricks delivered in some manner in or before the year 1834, as I collect, and therefore much more than six years

* 236 before the document was * signed. With a view, as I infer, of settling that question, the document is signed by them both, and signed substantially in duplicate; for although there is a difference between the two papers, the difference is immaterial. [His Lordship read the memorandum above set out.]

(a) 7 Bing. 163.

(b) 11 M. & W. 542.

(c) 15 Beav. 415.

(d) 4 A. & E. 71.

(e) 7 Q. B. 479.

(g) 6 T. R. 189.

It is said that this document not only acknowledges the bricks as equivalent to a payment in 1834, on account of the debts between the testator and the respondent, but makes the transaction equivalent to a payment in the year 1845. To that I cannot agree. I apprehend that the effect of the document, in this respect, was merely to cut away all ground of question as to the propriety of such an item of debit or credit standing in the accounts as of the date of 1834. Therefore, payment for any purpose material upon the present occasion, I apprehend, could not well be. I think that it was neither payment, nor any thing equivalent to payment for any such purpose.

But then it is said that, as the paper uses the words "general account," it is equivalent to an acknowledgment of all the items that either of them was capable of bringing against the other in their books or otherwise (although there was no account delivered, and although there was no document that could be called a general account), and that this, therefore, is equivalent to a promise in writing to pay the balance upon the general account, whatever it might be. I cannot so view the matter. I apprehend that it would be substantially equivalent to a repeal of Lord TENTERDEN's Act, to give that effect to it. "In his general account" means merely this, that whatever our accounts may happen to be, — whatever may be the state of demands between us, Dr. Hughes is to have * credit for the sum mentioned. That effect is not * 237 denied, and no other effect could it, in my opinion, have.

The account therefore to be directed must, I apprehend, be of what (if any thing) is due in respect of any transactions within six years before the death of the testator. Coming to this conclusion, I desire not to be understood as giving an opinion upon any of the cases that have been cited.

THE LORD JUSTICE TURNER. — I think also that in this case there is no such payment or acknowledgment as can take the case out of the operation of the Statute of Limitations. To treat the sum of 174*l.* as a payment by Dr. Hughes to Mr. Robinson, it must of course be assumed that the 174*l.* was due from Dr. Hughes to Mr. Robinson at the time of the payment, but the account shows that no such sum was or could be due at that time. Besides if the 174*l.* is to be taken as a payment, it must, as I think, be taken as a pay-

ment at the time when it is entered in the account, and not at the time when the agreement was entered into.

That reduces the case to the question upon the memorandum, and I take the memorandum to amount to no more than this; namely, an agreement to take a particular item into account between the parties. What the account was, how the account stood, or how it would stand upon being taken, are matters on which the memorandum is wholly silent. Such a memorandum is not, in my opinion, sufficient to take the case out of the operation of the Statute of Limitations.

THE LORD JUSTICE KNIGHT BRUCE. — Our order will be to * 238 vary the order of the 22d of * January last, and to direct that, as varied, it be as follows: Neither allow nor overrule the exceptions, and let an account be taken of what, if any thing, is due to Mr. Robinson, from the estate of the testator John Hughes, in respect of any dealings or transactions between them subsequent to the 2d of December, 1841, and in taking the account all just allowances are to be made.

The order also directed an account as to a bond debt not material to be here noticed.

HACKWOOD v. LOCKERBY.

1855. May 8. Before the LORDS JUSTICES.

Where a defendant had been served with the bill out of the jurisdiction of the Court where he resided, but came from time to time to England, the Court declined to issue an attachment against him for want of appearance.¹

THIS was an application made *ex parte* for an attachment, for want of appearance to the bill. The defendant had been served under an order obtained for that purpose with the bill in the Isle of Man, and was stated to be in the habit of coming over to Liver-

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 453.

pool, where he had been seen since the service of the bill upon him. The Vice-Chancellor had declined making the order for which there appeared no precedent.

Mr. G. M. Giffard, in support of the application, submitted that the defendant was in contempt, and that whenever he came within the jurisdiction he ought to be subject to the consequences of it, of which he was apprised by the ordinary notice indorsed upon the bill.

Their Lordships declined making the order, and suggested that an appearance might be entered for the defendant by the plaintiff.

* ROBINSON v. ANDERSON.

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1855. May 24. Before the LORDS JUSTICES.

Where two separate solicitors are retained by the same clients in the same business, the presumption of law is, that as their liability is joint, the profits are to be equally divided, and this presumption is not removed by the delivery of separate bills of costs where the solicitors have conducted different parts of the business. Where, therefore, the evidence in favour of an agreement for a different division was not stronger than that against it, the Court decided in favour of equality.¹

In a case of conflicting testimony, neither party has the right to demand an issue, if the Court is able without one to arrive at a conclusion satisfactory to its own mind.²

THIS was the appeal of the defendant from a decision of the Master of the Rolls, holding that the plaintiff and defendant who were solicitors, carrying on business separately, but who had been jointly retained by the same clients to defend the same actions, were entitled to participate equally in the profits.

The actions which led to the dispute were brought in 1838 by the trustee of a market-place against two persons who had used

¹ See *Stewart v. Forbes*, 1 Mac. & G. 137, n. (2) and cases cited.

² 2 Dan. Ch. Pr. (4th Am. ed.) 1071-1073, and notes; 1075, 1076 in notes; *Carlisle v. Cooper*, 3 C. E. Green (N. J.), 241; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Shaw v. Norfolk Co. R. R. Co.*, 16 Gray, 409.

the market for non-payment of the tolls. Upon these actions being commenced, a meeting took place of the persons using the market, and a committee was appointed for the purpose of defending the actions at the common expense of the persons using the market-place. The plaintiff was at first retained alone to defend the actions, but it being suggested that he was the solicitor of some of the *cestuis que trustent* of the market-place, it was resolved that the defendant should be retained and appointed to act as a joint attorney with the plaintiff in the defence of the actions. Communications took place accordingly between the plaintiff and defendant as to the terms on which the business and remuneration were to be divided between them, and the purport of these communications and of the arrangements (if any), made between the plaintiff, was the subject of conflicting evidence.

* 240 * The actions after verdicts for the plaintiff at the trials, with liberty to turn the verdicts into special cases, and after a consolidation of the actions and verdicts for the defendants in two successive new trials, followed by a rule absolute for another new trial, were finally compromised in 1848.

In January, 1849, the defendant, without communication with the plaintiff, made out and delivered to the committee his bill of costs as a bill due to himself alone, for the business done in the country relating to the actions, but not containing any items relating to the London portion of the business, nor to a portion of the business which had been personally transacted by the plaintiff. The amount of these costs was 1058*l.* 16*s.* 7*d.* The plaintiff, having heard of the delivery of this bill, remonstrated with the defendant against the delivery of a separate bill, and afterwards made out and delivered to the committee a bill of the costs not contained in the defendant's bill, amounting to 736*l.* 14*s.*

Payments had been made to the defendant on account of these bills by means of calls on the subscribers to the defence fund, and the plaintiff and defendant disagreeing as to the mode of accounting between themselves, the plaintiff filed the bill in the present suit, praying for a declaration that the moneys received ought to be applied in the first place in payment of the sums advanced by the plaintiff and defendant, and of the sums due to their London agents, and subject thereto ought (except with respect to a period during which the defendant had acted alone, and as to which there

was no question or dispute) to be divided equally between them, and for the proper consequential directions.

* The appeal was from the whole decree.

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Mr. Roundell Palmer and *Mr. Rendall*, for the plaintiff, contended that upon the evidence an agreement for an equal division was established.

Mr. Daniel and *Mr. C. Barber*, for the defendant, insisted that the effect of the evidence was in favour of an agreement for payment to each solicitor of the costs relating to the business transacted by him, and that this was further shown by the delivery of two distinct bills. At all events, they contended that if the evidence left the nature of the agreement in doubt, the defendant was entitled to have an issue directed.

THE LORD JUSTICE KNIGHT BRUCE. — The evidence satisfies us that the result of it cannot be represented more favourably for the defendant than that the statements on one side neutralize those on the other. So putting it, I conceive that the presumption of law remains, which is equality. I believe, indeed, that this was the agreement, and that the decision of the Master of the Rolls, with which I entirely agree, is not less according to the truth and honour than it is according to the technical equity of the case.

THE LORD JUSTICE TURNER. — My opinion entirely agrees with that of my learned brother. The plaintiff and defendant were jointly retained to defend certain actions. They must, therefore, have been in some sense jointly interested in the profits of the proceedings. In the absence of evidence of an * agree- * 242 ment for a different division the presumption is in favour of equality, inasmuch as they were jointly liable to the clients for the proper conduct of the business. The burden of showing an agreement to the contrary is on the defendant. The delivery of separate bills of costs which has been relied upon does not, I think, afford any presumption that the solicitors were not jointly interested in a case like the present, where they conducted different parts of the business.

It has been much pressed upon us, that in a case of conflicting evidence it is the right of either party to have an issue directed.

I disavow any such doctrine. I think that if the Court is able to come to a conclusion satisfactory to its own mind, it is not bound to direct an issue.

Appeal dismissed with costs.

1855. May 25, 28. Before the LORDS JUSTICES.

The solicitor of an executrix had in that character title-deeds of the testator's leasehold property. He acted for the executrix in a suit instituted against her by *cestuis que trustent* under the will. On her death an administratrix *de bonis non* of the testator applied for the deeds to the solicitor, and on his refusal to give them up without being paid his costs, instituted a suit against him to have them delivered up: *Held*, that unless the estate of the executrix was indebted to that of the testator, her estate was entitled to a lien on the deeds for her costs, and that the solicitor had a lien to that extent. On the administratrix suggesting that the testatrix's estate was so indebted, the suit for delivery of the deeds was ordered to stand over until proceedings had been taken in the other suit to try that question.¹

THIS was an appeal from a decision of the Master of the Rolls, reported in the twentieth volume of Mr. Beavan's Reports. (a)

Some of the *cestuis que trustent* under a will instituted a suit against the executrix, who was tenant for life under it, for administration of the testator's estate. The suit was defended on her behalf by her solicitor, who, in that character, held title-deeds of the testator's leasehold estates. Before the hearing the executrix died, and the suit having been revived against an administratrix *de bonis non* of the testator (without, however, making a party to the suit any representative of the deceased executrix), a decree for administration of the estate of the testator was made. The administratrix *de bonis non* applied to the solicitor for the title-deeds, and on his refusal to deliver them up without payment of his bill of costs against the executrix, the administratrix insti-

(a) Page 185.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1842, 1843, and cases referred to in note (3).

tuted the present suit against him, to have the deeds delivered up. The Master of the Rolls made a decree accordingly, and the solicitor appealed from the decision.

Mr. Follett and Mr. Macnaghten, for the plaintiff, referred to *Pelly v. Wathen*, (a) *Molesworth v. Robbins*, (b) * *Hall v. Laver*, (c) *Baker v. Henderson*, (d) *Bell v. Taylor*, (e) *Warburton v. Edge*, (g) *Francis v. Francis*, (h) and, on the question of parties, cited *Angerstein v. Clarke*. (i) * 244

Mr. R. Palmer and Mr. F. T. White, for the appellant.

THE LORD JUSTICE TURNER. — In this case the testator appointed his widow executrix, and gave her some leaseholds and shares, being the bulk of his property, for her life, with subsequent limitations to his children. A suit was instituted to administer the trusts of the will, and the widow put in her answer, but died when the cause was ripe for hearing. Some title-deeds of the testator's property were then in the hands of the defendant Mr. Letts, the widow's solicitor, who claimed a lien upon them for 63*l.*, being the expenses of preparing the widow's answer. The plaintiffs in the original suit, instead of applying in that suit for the delivery up of the deeds, passed by the claim of the executrix to be indemnified against the costs of that suit, and, with the intention of defeating that claim, proceeded by a fresh bill in the name of the administratrix *de bonis non*, to recover the deeds. The effect of the decree of the Master of the Rolls is to take away from the executrix, or those who claim under her, the security for her expenses as trustee. If there had been no question as to the solicitor's lien, the residuary legatees could not have taken the deeds out of the hands of the executrix, except on the terms of indemnifying * her against the costs of the other suit. It * 245 is said that there was nothing due to the executrix, and that she was, on the contrary, a debtor to the testator's estate; but this cannot be ascertained in the absence of any representative of the executrix. It is said that she has no legal personal repre-

(a) 1 De G., M. & G. 16.

(b) 2 Jones & Lat. 358.

(c) 1 Hare, 671.

(d) 4 Sim. 27.

(e) 8 Sim. 216.

(g) 9 Sim. 216.

(h) 2 De G., M. & G. 73.

(i) 3 Swanst. 147, note.

sentative. The Court, however, has power to appoint a person to represent her estate for the purposes of the suit. If it appears that her estate was indebted to that of the testator, Mr. Letts will be in peril if he refuses to deliver up the deeds; but the present decree takes them away from him without regard to the claims of the widow's personal representative. The more advisable course for setting the matter right seems to be to order the appeal to stand over, Mr. Letts undertaking to apply in the original suit for liberty to bring the documents into Court in that suit, subject to his lien (if any), the documents not to be delivered out without notice to him, and he to concur in any proceedings which the Court may direct in that suit for ascertaining whether any and what lien exists, and liberty being given to him to apply accordingly. If the executrix was indebted to the estate, Mr. Letts will have great difficulty in establishing a lien.

The Lord Justice KNIGHT BRUCE concurred.

1855. May 30. Before the LORDS JUSTICES.

The three months mentioned in the 29th Order of August 7th, 1852, as to moving to dismiss for want of prosecution, are not to be reckoned exclusively of vacation.¹

THIS was a motion appealing from an order of Vice-Chancellor KINDERSLEY, directing notice of motion for a decree to be served, or the cause to be set down within one month, or the bill to be dismissed.

The bill was filed on the 1st of February, and on the 8th of February the defendant appeared. No answer was required from him. On May 15th, the defendant gave notice of a motion to dismiss for want of prosecution, under the 29th Order of the 7th of August, 1852, which is as follows: "A defendant to a suit com-

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 803, 965.

menced by bill who shall not have been required to answer the bill, and shall not have answered the same, shall be at liberty to apply for an order to dismiss the bill for want of prosecution at any time after the expiration of three months from the time of his appearance, unless a motion for a decree or decretal order shall have been set down in the mean time, or the cause shall have been set down to be heard, and the Court may upon such application, if it shall think fit, make an order dismissing the bill, or make such other order, or impose such terms as may appear just and reasonable."

The plaintiff appealed.

Mr. F. S. Williams, for the plaintiff. — By the 118th Order of May, 1845, a motion cannot be made to dismiss until after the expiration of the time allowed to amend; and according to the 14th Order of May, 1845, vacations are not to be reckoned in this * computation. The Easter vacation, therefore, ought * 247 not to have been here reckoned, and on that computation the motion was premature.

He referred to *Dalton v. Hayter*, (a) *Rochdale Canal Company v. King*. (b)

Mr. Haddan, for the defendant.

Their Lordships held, that the period of three months, mentioned in the 29th Order of 7th August, 1852, was not exclusive of vacations.

Ultimately it was arranged that the plaintiff should serve notice of motion for a decree, or set down the cause within five weeks, or the bill be dismissed, and should pay the costs here and below of this application.

(a) 7 Beav. 586.

(b) 16 Beav. 630.

1855. May 30, 31. Before the LORDS JUSTICES.

A testator, having three sons and three daughters, gave by his will his residuary estate in trust to be divided into six shares ("being as many shares as" he had children), one share to be for the benefit of each child in manner following, viz., the share of sons to be paid to them as soon as convenient after the testator's death, and the shares of daughters to be vested in trustees for their respective benefit as thereafter mentioned. Provided that if any son died without having issue living at his death, the share intended for such son, and any share accruing under that proviso, should accrue to the survivors of the testator's children, their executors or administrators. And he directed his daughters' shares to be invested upon trusts therein mentioned for them and their children. By a codicil, reciting that he desired to settle more distinctly the share of one of the daughters, he revoked the will as to her share, and gave it in trust for her for life, and after her death for such of her children as should attain twenty-one, or, being daughters, marry; and in case she should have no child living at her decease who should attain a vested interest, in trust for the testator's children who should be living at her decease, and the representatives of such as should be dead. One of the testator's sons died in his lifetime a bachelor, and the above-mentioned daughter died after the testator's death a spinster: *Held*, —

1. That the surviving sons' shares, both original and accruing, vested absolutely on the testator's death, the clause of substitution, as to sons' shares, operating only in case of death in the lifetime of the testator.
2. That the daughters' accruing shares vested in them absolutely.¹

THIS was an appeal from the decision of Vice-Chancellor STUART upon the construction of the will of William Watson, dated the 5th of July, 1833, whereby he gave the residue of his real and personal estate upon trusts for conversion into money, and after payment of his debts and testamentary and funeral expenses he directed his trustees to retain in their hands a sum of money sufficient to produce the yearly sum of 250*l.*, and to invest the same and pay the dividends to his wife for her life for her separate use, and to stand possessed of the money to arise from his residuary estate upon trusts expressed as follows: "Upon trust that they, or the survivors or survivor of them, do and shall divide the same

¹ See *Bowers v. Bowers*, L. R. 5 Ch. Ap. 244.

into six equal shares, being as many shares as I have children now living, and one of the said shares to be for the benefit of each of my said children, in manner hereinafter mentioned, the shares of each and every of my sons, viz., William, Henry, and John, to be * paid and transferred and assigned to them accordingly as soon as conveniently may be after my decease, and the shares of my daughters Elizabeth Ware, Ann and Sophia Watson, to be vested interests respectively for their respective benefits in manner hereinafter mentioned, immediately upon or after my decease: provided always, nevertheless, and I do hereby direct that in making such division as aforesaid, all and every the sum and sums of money which I have advanced or paid, or shall advance or pay to or for the preferment, advancement, or benefit of any one or more of my said six children which shall appear by any memorandum or note in my handwriting of the sums or sum so advanced to him, her, or them respectively, the same shall be considered as part of the portions or shares of the child or respective children to whom or in whose favor the same shall have been respectively so advanced as aforesaid, it being my intention that none of my said six children who shall have been so advanced as last aforesaid shall be entitled to any share of my said residuary estate until the others and every other of them shall have received thereout so much as will place them on an equal footing with the child or children so advanced as aforesaid: provided always, and I do hereby declare my will and mind to be, that if any of my said sons shall depart this life without having any issue of his or their body or respective bodies living at the time of his or their decease or respective deceases, or born in due time after their decease, the share by me intended to be provided for each such son so dying, and also the share or shares surviving or accruing by virtue of this present clause, shall from time to time go, accrue, and belong to, or be for the benefit of, the survivors of my said children, their executors, administrators, and assigns, in equal shares." And the testator thereby declared that the trustees should stand possessed of and interested in the portions thereinbefore by him provided * for his said daughters, and invest the same in the * 250 government stocks or funds in their names, and stand possessed thereof, as to the share of his daughter the wife of Thomas Wade, upon trust during her life to pay the interest, dividends, and annual produce of her share for her separate use without power of

anticipation, and from and immediately after the decease of his said daughter, to stand possessed of and interested in the said share in trust for all and every the child and children of the said Elizabeth Wade by her then present or any future husband who should attain the age of twenty-one years, to be divided among them, if more than one, in equal shares, and if there should be no such child, then in trust for the benefit of the survivors or survivor of his said sons and daughters, to be divided equally, and in case there should be none of them surviving, then to be divided equally amongst such of the children of his said sons and daughters as should be then living; and the testator further directed that the sum of 500*L.*, which he advanced to his said daughter Elizabeth on her marriage with the said Thomas Wade, should be placed to the account of his said daughter Elizabeth, and should be taken and considered as so much advanced and placed to her on account of her share and interest in and under that his will; and as to the shares of each of his daughters Ann Watson and Sophia Watson, upon trust during their lives to pay the interest, dividends, and annual produce of their respective shares into their own hands for their separate use. And the testator further declared, that in case either of his said daughters married, his said trustees should, from and immediately after the decease of such married daughter, stand and be possessed of and interested in the share of such married daughter, and the stocks, funds, and securities forming the same, and the interest, dividends, and annual produce thereof, in

* 251 trust for all and every the child and children of such * marriage or marriages, to be divided amongst such children in equal shares and proportions, and in trust during the minority of such child or children to pay the interest, dividends, and annual produce arising from their respective shares towards his, her, or their maintenance and education, and from and immediately after such child or children, being a son or sons, respectively attaining the age of twenty-one years, or being a daughter or daughters should attain that age or marry previously thereto, to pay unto such child or children his, her, or their share of and in the said trust moneys, stocks, funds, and securities; and if there should be no such child, then in trust for the benefit of the survivors or survivor of his said sons and daughters, to be divided equally amongst them; and in case there should be none of them surviving, then to be divided equally, share and share alike, amongst such of the children of his

said sons and daughters as should be then living, in manner herein-before mentioned.

By a codicil dated the 11th of August, 1835, the testator, after reciting his desire that the share of Sophia given by his will should be more distinctly settled for her own use and benefit, revoked his will so far as it applied to Sophia's share, and gave the sixth part or share thereby given for the benefit of Sophia upon the following trusts, that was to say : upon trust to lay out and invest such sixth part or share in the names of them, his said trustees, in government securities, at interest, to a separate account, and from time to time to receive the dividends, interest, and annual produce thereof, and to pay and apply the same for and towards her sole and separate use and benefit for her life, free from the debts, control, or engagements of any husband with whom she might thereafter happen to intermarry ; and inasmuch as his said daughter Sophia was then in a delicate state of health and incapable of managing her affairs, and might * by possibility continue * 252 so after she should have attained her age of twenty-one years, so as to require that some one should administer and take charge of her personal property, as or in the same manner as was done for infants whilst in their minority, the testator thereby directed and declared that the trustees for the time being of his said daughter Sophia's property, as well during her minority as afterwards, should pay the dividends, interest, and annual produce of her fortune into her own hands by weekly, monthly, or other short and convenient instalments ; and in case of weakness, ill health, or incapacity as aforesaid at any time during her life, might pay, apply, lay out, and expend the same for her use, benefit, and comfort in such way and manner at the discretion of his said trustees in all respects as if she were under the age of twenty-one years, without being answerable or accountable to his said daughter Sophia for the same, otherwise than as guardians were answerable to their wards under the age of twenty-one years in a Court of Equity ; and from and immediately after the decease of his said daughter Sophia, then the testator declared and directed that the trustees should stand possessed of the capital of her share in trust for her children who should attain the age of twenty-one years or marry (if more than one in equal shares) ; and after providing for the maintenance and education of children until their majority or marriage, the testator directed, that in case his said

daughter should not leave any issue, or should not leave any child at her decease who should live to acquire a vested interest under the trust aforesaid, his trustees should stand possessed of the said one-sixth share, and the stocks and funds upon which the same might be invested, in trust for the benefit of such of his other children as should be living at the time of the decease of his said

daughter Sophia without issue as aforesaid, their executors, administrators, and assigns, in equal shares to * and amongst the children or representatives of such of them his said children as should be then dead, to take the same *per stirpes et non per capita*; and the testator directed, that, in case the sixth part or share of the residue of his said estate so intended for his daughter Sophia should not yield an income of 100*l.* per annum, it should be lawful for his trustees to sink the whole or such part of the capital of such sixth share as they might in their discretion think fit or find necessary in the purchase of a government life annuity for his said daughter as would altogether yield an income of at least 100*l.* per annum, or such further or other sum as his trustees might in their discretion consider to be necessary for her comfort, maintenance, and support, regard being had to the amount of her fortune and to her situation and state of health.

The testator's son, Henry, died a bachelor in the testator's lifetime.

The testator died on the 5th of January, 1848, leaving his widow, his sons William and John, and his three daughters, Elizabeth, Ann, and Sophia, him surviving.

The widow died in 1848. No child of the testator married except Elizabeth. Sophia died in 1850, and Ann took out administration to her estate.

The bill was filed on behalf of the infant children of Elizabeth, to have the trusts of the will carried into effect, and, on further directions, the decree under appeal was made, declaring that, according to the true construction of the will, the shares of William and John, both original and accruing, vested in them absolutely at the testator's death, but that the shares of * 254 Elizabeth and * Ann, both original and accruing, were subject to the trusts for them and their children.

From this decision, as far as it was adverse to her, Ann Watson appealed.

Mr. Chandless and *Mr. Cole*, in support of the appeal. — According to the true construction of the will, the deceased sister took absolutely, and the appellant as her administratrix was entitled to her share. Also the appellant is absolutely entitled to her accruing share of the share intended for her brother Henry, who died in the testator's lifetime. As to the original shares they are liable to accrue on the death of any of the sons or daughters who may die without having issue, and therefore the decree is wrong in declaring the sons absolutely entitled.

They referred to *Wright v. Atkyns*, (a) *Gee v. Corporation of Manchester*, (b) *Hall v. Fisher*. (c)

Mr. Malins and *Mr. Hetherington*, for William Watson, *Mr. Craig* and *Mr. Surrage*, for John Watson, and *Mr. Elmsley* and *Mr. W. Rudall*, for the infant plaintiffs, referred to *Woodburn v. Woodburn*, (d) *Clayton v. Lowe*, (e) *Doe v. Sparrow*, (g) *Edwards v. Edwards*, (h) *Farthing v. Allen*, (i) *Child v. Giblett*, (k) *Gosling v. Townshend*, (l) and the authorities * referred to * 255 by *Mr. Jarman* in the 2d volume of his *Treatise on Wills*, page 688.

Mr. Chandless, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The length of time that the argument of this cause occupied has been greater than I should have considered possible. As *Mr. Justice BULLER* said in *Doe v. Lyde*, “Nothing, in my opinion, can raise a doubt in this case but overwhelming it with a number of cases.”

The material dates and facts here are thus: The will and codicil to be construed are dated respectively in 1833 and 1835. Henry, one of the testator's six children, died a bachelor in the year 1846. The testator and his widow died in the year 1848. His daughter Sophia, who never married, died in 1850 intestate, and her administratrix is her sister, the appellant, Miss Ann Wat-

(a) 19 Ves. 299.

(b) 17 Q. B. 737.

(c) 1 Coll. 47.

(d) 3 De Gex & Sm. 643.

(e) 5 B. & A. 638.

(g) 13 East, 359.

(h) 15 Beav. 357.

(i) 2 Madd. 310.

(k) 3 Myl. & K. 71.

(l) 17 Beav. 245.

son. The question is as to the title to the four-sixths of the testator's residuary estate, both real and personal, intended by him originally for the benefit, whether during life only, or more extensively, of his two surviving sons and his two deceased children, and I construe the will and codicil in respect of these four-sixths partly as his Honor the Vice-Chancellor has done, and partly otherwise.

It appears to me that the testator has shown an intention to give and has given the two original sixths of the two surviving sons to those two sons absolutely, that the original sixth, which would have belonged to Henry if he were now alive, would in that event have belonged to him absolutely, and, in the events which have happened, belongs, as to four-fifths of it, to the testator's four surviving * children absolutely, and as to the other fifth of it absolutely to the appellant, Miss Ann Watson, in the character of administratrix of her sister Sophia, and that the original sixth of Sophia, the original sixth, namely, which belonged to Sophia for her life, now belongs absolutely (or so much of it as remained at her death belongs absolutely) to the testator's four surviving children.

Not one of these conclusions, as I think, contravenes the case of *Gosling v. Townshend*; the will there was essentially different from the will and codicil here. The strong and marked diversity between the present testator's language in mentioning and disposing of the original shares of his sons, and that in which he mentions and disposes of the original shares of his daughters (going far beyond any difference of that kind to be found in the will expounded in *Gosling v. Townshend*), and the whole of the provisions before us taken together, demonstrate, as it seems to me, that the present testator intended his sons that should survive him, or at least that should survive both him and his widow, to take absolutely whatever was given to those sons; nor do I find enough in the instruments by which to cut down to less than an absolute interest what he gave to his daughters in the share of Henry, or what he gave to the surviving daughters in the share of Sophia.

THE LORD JUSTICE TURNER. — There are two questions in the present case: first, whether the accrued shares of the two sons vested in them absolutely; secondly, whether the accrued shares

of the daughters were subject to the trusts for their children declared of the original shares. First, as to the * second * 257 question. The disposition of the shares of the children was as follows: [His Lordship read it.] So that, in the case of both the original and accruing shares, the surviving children were to take. There is no gift to the grandchildren, except in the event of there being no surviving child. Is there any manifest intention tending to countervail the express terms of the will? The intention seems to me directly the other way. It is clear, from the gift over of Sophia's share in the codicil, that when the testator wished to give an interest to his grandchildren, he knew how to do it. For in the codicil the limitations, in the event of his having no children, are these: [His Lordship read them.] He therefore knew how to provide for such an event.

If the testator had intended the accrued shares to go to the grandchildren, he would have expressed himself as he has done in the codicil with reference to Sophia's share. He has not done so, and the inference is that he did not intend them to go to the grandchildren. But yet the construction for which *Mr. Chandlee* has contended would give to grandchildren that which the testator has pointedly abstained from giving them, and so far as we can collect his intention, it was contrary to this contention. The argument in support of the contention is, that the word "share" extends to accruing shares. But the word is not "shares," but "share" in the singular; that is, the original share. I am therefore of opinion that, according to the true construction of the will, the accruing shares are free from the trusts of the original share, and went to the surviving daughters absolutely. So far, therefore, I differ from the Vice-Chancellor.

As to the first question, whether the sons took absolutely the original and accrued shares, it is clear that the testator gave the accrued shares to the daughters absolutely, * and it is * 258 improbable that he should intend the daughters to take absolutely, and not the sons. The reasonable inference is, that he intended the sons to take the accrued shares absolutely.

As to the original shares, the provisions of the will are peculiar, and the first observation that occurs is, that the testator has directed the trustees to divide the fund into six equal shares, and the reason for this is given, "being as many shares as I have children now living," showing that this is a will made with reference

to the then existing state of circumstances. He then declares the trusts thus: "One of the said shares to be for the benefit of each of my said children in manner hereinafter mentioned." The testator then makes a careful distinction between the shares of the sons and those of the daughters, and is equally careful in distinguishing the trusts of their shares, directing the shares of the sons to be paid, transferred, and assigned to them, and those of the daughters to be vested in them in manner thereinafter mentioned. Whatever effect the words "pay and divide" might have had if they had stood by themselves, as in most of the authorities cited, we have here a clear expression of intention, showing the testator to have meant something different from a direction that the shares should be vested, when he used the words "pay and transfer."

We then come to the proviso with respect to the shares of sons dying without issue. [His Lordship read it.] This is a proviso which in different wills has different meanings, according to the intentions of the testators. It may be intended to take effect by substitution or by limitation, and if by limitation it may be intended to operate generally, or may be confined to the period of the testator's lifetime. But it is not immaterial to observe that the * 259 words may operate by substitution, and I * think that, upon the true construction of the will, the meaning of the testator was to substitute the survivors or survivor for the person who, if he had survived the testator, would have taken under the original gift. Of course there could be no substitution for those whose shares had been paid or transferred in his own lifetime.

Looking at the expression "then living," and the distinction between the trusts for the sons and daughters, and the whole language of the trusts, I am of opinion that there is in the will enough to control the general effect of the proviso, and to show that the intention of the testator was, that the sons should take both their original and accrued shares absolutely.

The Lord Justice KNIGHT BRUCE, with reference to the following passage of his Lordship's judgment in *Key v. Key*, (a) said that he adhered to it: "In common with all men, I must acknowledge that there are many cases upon the construction of documents, in which the spirit is strong enough to overcome the letter; cases

(a) 4 De G., M. & G. 73-84.

in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.”¹

The order under appeal was varied, by declaring in * substance that each of the sons William and John took * 260 an absolute and indefeasible interest in one-sixth part, and that the one-sixth share intended for Henry became divisible in five shares between the then two surviving sons and the three daughters, and that such sons and daughters took absolute and indefeasible interests therein, and that the one-fifth of the late daughter Sophia of such one-sixth was to be paid to the appellant Miss Watson as her legal personal representative, and that on the death of Sophia her one-sixth share became divisible into four parts between the surviving two sons and two daughters, and that they took absolute and indefeasible interests therein.

* WHEATLEY v. BASTOW.

* 261

1855. May 7, 8. June 9. Before the LORDS JUSTICES.

A brother and sister entitled in moieties to a reversionary interest in a fund in Court, mortgaged it to secure a debt of the brother, the sister joining, and being described in the security as a surety for the brother. The mortgagee obtained a stop order, and afterwards on his marriage assigned the mortgage-debt to trustees, who however neither obtained a stop order nor gave notice to the sister of the settlement. On a petition of the brother stating that the tenant for life had assigned to him her life-interest in his share of the fund, and that he had paid a portion of the mortgage-debt, and praying for a transfer of his share of the fund, a solicitor who had acted for the sister and for the mortgagee on the occasion of the mortgage, took upon himself without authority to instruct counsel to appear for the sister and her husband, and also for the mortgagee, who was abroad, and

¹ See *Key v. Key*, 4 De G., M. & G. 73 in note (1).

to consent to or not oppose the petition. Upon the hearing of this petition the fund was ordered to be, and was transferred out of Court: *Held*:—

1. That the mortgagee was not bound or affected by the unauthorized appearance for him.
 2. That neither the omission of the trustees to obtain a stop order, nor any of the above circumstances, operated to discharge the liability of the surety's share, but that it continued subject to the payment of the mortgage-debt.
- On the above circumstances appearing in evidence, although the solicitor was not a party, but only a witness in the cause, the Court directed him to be served with notice to show cause why he should not be struck off the roll.¹

THIS was an appeal from the decision of Vice-Chancellor STUART, holding that a reversionary interest of the late plaintiff, the wife of the present plaintiff Henry Wheatley, in a fund in Court, which she had while single as a surety mortgaged to secure a debt of her brother, was discharged from the liability created by the mortgage under the following circumstances:

The interest in question arose under the will of John Lloyd, dated the 20th of March, 1834, whereby the sum of 9000*l.* 3*l.* per cent consolidated bank annuities was bequeathed to trustees in trust to pay the dividends of 4000*l.* consols, part thereof to Ann Barratt (Mrs. Wheatley's mother) for her life for her separate use, without power of anticipation, and after her decease in trust to divide the capital of 4000*l.* consols among her children equally.

* 262 * In 1835, soon after the testator's death, the trustees instituted a suit of *Morrison v. Jefferies* for the administration of his estate, and in that suit the sum of 4000*l.* consols was transferred into Court, and carried over to a separate account, entitled "the annuity account of Ann Barratt and her children." This sum was afterwards reduced, by payment of the legacy duty, to 3589*l.* 15*s.* 8*d.* consols.

Mrs. Barratt had two children besides Mrs. Wheatley; viz., Thomas Barratt the younger and Ann Barratt.

By an indenture, dated the 23d of February, 1841, made between Thomas Barratt the younger of the first part, Mrs. Wheatley, by her then name of Hester Barratt of the second part, Thomas Barratt the elder of the third part, John Collins of the fourth part, and the defendant William Bastow of the fifth part, after reciting that Thomas Barratt the younger was in want of

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1840.

1000*l.* to establish himself in business, and that he had, with Hester Barratt, Thomas Barratt the elder, and John Collins as his sureties, applied to and requested William Bastow to lend him that sum, which he had agreed to do upon having the repayment of the same with interest secured in manner therein expressed, it was witnessed that, in consideration of the sum of 1000*l.* paid to Thomas Barratt the younger, he and Hester Barratt as his surety assigned unto William Bastow, his executors, administrators, and assigns, the one undivided third part or share, and all other the parts or shares to which each of them was entitled under the above-mentioned will, expectant on the decease of Ann Barratt the elder, of and in the above-mentioned sum of consols, upon the trusts therein expressed for securing the repayment by Thomas Barratt the younger and * Hester Barratt, or either * 263 of them, of the sum of 1000*l.* and interest at 6*l.* 10*s.* per cent per annum.

On the 5th of March, 1841, William Bastow obtained a stop order in the cause of *Morrison v. Jefferies*.

On the 23d of February, 1846, William Bastow, previously to and in contemplation of his marriage, executed an indenture of settlement of that date, whereby he assigned the mortgage debt of 1000*l.* and the securities for the same to trustees upon trusts for the benefit of himself and his wife and the issue of the marriage.

No stop order was obtained by the trustees of the settlement, nor did they give any notice of it to Mrs. Wheatley before her marriage, or to her or her husband afterwards.

In June, 1846, she married the plaintiff Henry Wheatley, but no settlement was executed upon or subsequently to their marriage.

On the 28th of November, 1846, Mr. Collins, who was the uncle of Mrs. Wheatley, and who had acted as the solicitor of her and her brother, as well as of William Bastow, in the preparation of the mortgage, caused a petition to be presented in the cause of *Morrison v. Jefferies*, purporting to be that of Thomas Barratt the younger and Ann Barratt the younger, stating that Thomas Barratt the younger had paid William Bastow the sum of 500*l.* in part satisfaction and discharge of the debt of 1000*l.*, and stating an indenture of the 18th of November, 1846, whereby Mrs. Barratt assigned her life-interest in the dividends on the two-third parts or shares to which Thomas Barratt and Ann Barratt the

younger would be entitled of the fund in Court to

* 264 Thomas * Barratt and Ann Barratt the younger, during the life of Mrs. Barratt, as tenants in common, and praying that the accountant-general might be directed to sell two-third parts of the fund in Court, and to pay one moiety of the proceeds to each of the petitioners, and that the interest or dividends of the residue might be paid to Mrs. Barratt for her life, or until further order, and that no part of the said residue after the death of Mrs. Barratt might be transferred or paid to Henry Wheatley and his wife, or any other person, except William Bastow, without notice to him.

The petition omitted all mention of Mr. Bastow's marriage settlement.

Mr. Collins took upon himself to instruct counsel to appear upon this petition for Mr. Bastow, who was abroad, and also for Mr. and Mrs. Wheatley, and an order was, on the 18th of December, 1846, made in the terms of the prayer of the petition, and was expressed to have been made upon hearing counsel for the petitioners, for the defendant William Bastow and for Henry Wheatley and his wife.

Pursuant to the order of the 18th of December, 1846, two-third parts of the sum of the fund in Court were sold out, and the proceeds were received by Mr. Collins, or by him and his partner, as the solicitor or solicitors of the petitioners.

The original bill in the present suit, which was afterwards amended, was filed by Mrs. Wheatley, by a next friend, against Mr. Bastow and the trustees of his marriage settlement, and the persons beneficially interested under it. Mrs. Wheatley

* 265 having afterwards died, her * husband, having become her administrator, obtained an order to revive the suit.

The amended bill prayed that Mr. Bastow and the persons claiming under his marriage settlement might be declared to be bound by the statement in the petition whereon the order of the 18th of December, 1846, was made, that Mr. Barratt had paid Mr. Bastow 500*l.* in part satisfaction and discharge of his debt of 1000*l.* ; and for a declaration that all sums received or retained by Mr. Collins on behalf or for the use of Mr. Bastow, or of the trustees under his marriage settlement, in respect of the same debt or the interest thereof, ought to be considered as received by Mr. Bastow, or by

the trustees. The amended bill prayed also for an account of what (if any thing) was due to Mr. Bastow, or to the trustees of the settlement, in respect of the debt of 1000*l.* and interest, the plaintiff Henry Wheatley being willing to pay what (if any thing) should be found due.

The defendant Bastow, by his answer, stated that he was never served with a copy of the petition of the 28th of November, 1846, and never heard nor had any notice that any such petition had been or was intended to be presented by or in the name of any persons or person until some time after the order of the 18th of December, 1846, and the sale and payments thereby directed had been made. He further stated that the allegation contained in the petition that Thomas Barratt had paid the sum of 500*l.* in part satisfaction of the mortgage debt was wholly untrue, and he denied that Mr. Collins had any authority to act for him on the hearing of the petition.

Mr. Collins, who was examined as a witness in the cause on behalf of the plaintiff, stated in his evidence that his firm acted as solicitors for Mr. Bastow in the * preparation of * 266 the mortgage, and that the witness attended to it personally, and acted as solicitor for Mr. Bastow in all matters which required professional legal assistance; that he so acted in December, 1846; that Mr. Bastow was then on the continent; that the witness was a personal friend of Mr. Bastow, and that when the latter went abroad he left with the witness all his deeds, bills of exchange, shares in railways, and all his papers, as the witness believed, relating to all his property; that the witness considered that Mr. Bastow had left them with him to act in as large a manner as if Mr. Bastow had given him a power of attorney; that the witness had also acted as solicitor for Thomas and Ann Barratt in presenting the petition, and had instructed counsel to appear on behalf of Mr. Bastow, and consent to the order being made, and had done so on the authority which he had before mentioned, having had no other authority than that; that the witness received all the produce of the stock sold out of the share belonging to Mr. Thomas Barratt. On cross-examination the witness said that his firm had acted as solicitors for Mrs. Wheatley (who was the witness's niece) to the time of her marriage, and that after the marriage he considered himself the solicitor of the plaintiff and his wife, and acted as their solicitor in the matter of the petition;

that he had instructed counsel to appear and consent on their behalf; that Mrs. Barratt (Mrs. Wheatley's mother) was living with him at that time, and that he was in daily communication with Mrs. Wheatley; that there was no precise arrangement with the plaintiff and his wife as to the petition, but that the circumstances were almost daily talked over between the witness and Mrs. Wheatley's mother and sister, and Mrs. Wheatley when she came in (the Wheatleys living close to the witness); but that the witness had no communication with Mrs. Wheatley on the
 * 267 subject. He considered himself, however, * fully authorized to appear on behalf of Mr. and Mrs. Wheatley, and to instruct counsel to appear and consent to the petition on their behalf, or he should not have done so; that he was not aware that any copy of the petition was served on the trustees, and had no doubt that the order of the 18th of December, 1846, was obtained without their knowledge, which he did not consider necessary; that no copy of the petition was sent to Mr. Bastow, who did not know of it (so far as the witness was aware) till his return from the continent. When the witness mentioned it to him, and on his considering his security damnified by it, the witness handed him some securities, which he specified. The witness admitted that the statement in the petition that 500*l.*, part of the debt, had been paid to William Bastow, was not then true.

On re-examination, the witness stated that the plaintiff, Mr. Wheatley, had never authorized the witness in any way to act for him in the matter of the petition, and that he never gave any notice to Mr. or Mrs. Wheatley of Mr. Bastow's marriage settlement.

The Vice-Chancellor held, that relief could not be given upon the case made by the bill, but that upon the facts as disclosed there was this ground for relief, that the trustees by omitting to obtain a stop order, or to give notice to Mrs. Wheatley or her husband of the settlement, the trustees of that instrument had caused the loss of Mr. Barratt's portion of the fund, which was primarily liable to the mortgage debt, and had thereby discharged Mrs. Wheatley's portion, and that the defendant William Bastow and his trustees could not treat the share of Mrs. Wheatley as subject to the security.

His Honor made a decree, declaring that the defendants,
 * 268 * the trustees of the settlement, had lost all right to resort to the remainder of the fund in Court, and that the plaintiff

Henry Wheatley, as the administrator of the estate and effects of the late plaintiff Hester Wheatley, deceased, was entitled to the bank annuities, subject to the life-interest of Mrs. Barratt therein, and directing that the defendants, the trustees, should, on or before the 1st of June then next, execute a proper deed assigning the remaining fund in Court, subject as aforesaid, to the plaintiff Mr. Wheatley, as such administrator as aforesaid, and directing Mr. Bastow and the trustees to pay the plaintiff's costs.

From this decree Mr. and Mrs. Bastow and their children appealed.

Mr. Malins and *Mr. Goldsmid*, for the plaintiff, in support of the decree. — In the first place, the event which has happened is not one against which the surety agreed to fill that character. She never agreed to guarantee the mortgagee against the act of this Court, or to be a surety for the correctness of its proceedings. Secondly, the solicitor through whose act the share of the fund has been abstracted, was the mortgagee's solicitor, or must be so treated. It is necessary for the administration of justice, that the Court should act upon the consent of its officer who takes on himself to represent a client, and the remedy which the client has is against the solicitor. Thirdly, the trustees facilitated the fraud by omitting to do what was incumbent upon them; namely, to obtain a stop order, or at all events to give to the surety notice of the settlement. As they took neither of these steps, they were properly held by the Vice-Chancellor to have discharged the sister's share.

* They referred to *Duke of Beaufort v. Neeld*, (a) *Capel* * 269 v. *Butler*, (b) *Watson v. Allcock*, (c) *Watts v. Hyde*, (d) *Palk v. Clinton*, (e) *Stronge v. Hawkes*. (g)

Mr. Rolt and *Mr. Speed*, for the appellants. — The principles on which a surety is held to be discharged by conduct of the creditor, do not at all apply to the present case. Those principles are thus explained by Lord ROSSLYN in *Rees v. Berrington*: (h) "It

(a) 12 Cl. & Fin. 248.

(b) 2 Sim. & St. 457.

(c) 4 De G., M. & G. 242.

(d) 2 Ph. 406.

(e) 12 Ves. 48.

(g) 4 De G., M. & G. 186.

(h) 2 Ves. Jr. 543.

only amounts to this, that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge, whether he will give that indulgence contrary to the nature of his engagement."

Here there has been no dealing on the part of the trustees with the principal debtor. Nor has there even been any omission of which the surety can complain. They owed no obligation to any one but their *cestuis que trustent*, to obtain a stop order or to give any notice of the settlement. The whole basis of the doctrine as to the discharge of a surety is, that there must be good faith on the part of the creditor. Here, however, the argument has been, that if perchance the subject of the security is lost without the

fault of either creditor or surety, it is the creditor, and not * 270 the surety, who is to be * the sufferer. That has never been the law. The contract is, that the surety shall be liable for so much of the debt as is not paid by the principal, from whatever cause the failure to pay may arise, other than any default of the creditor himself. The surety contracts to stand between the creditor and loss. No authority has been or can be cited for any such proposition as that on which the judgment below is founded, namely, that a surety is discharged by want of notice of the assignment of the debt. The authorities are collected in a note to *Mayhew v. Cricket*. (a) They are thus summed up by Mr. Justice STORY: (b) "If a creditor does any act injurious to the surety or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged."

No authority carries the doctrine beyond this. In *Watson v. Allcock*, (c) the surety was damnified by the default of the creditor in not filing the warrant of attorney, a default which had put it out of the power of the latter to perform the agreement into which

(a) 2 Swanst. 185.

(c) 4 De G., M. & G. 242.

(b) 1 Story Eq. Jur. § 325.

he had entered with the surety, to issue execution when requested by the surety. The principle is, that the surety is a trustee of his security for the benefit of the surety. But his omission to do an act which he was not bound to do by any contract, express or implied, but which being done might possibly have prevented loss, has never been held to prejudice him. A contrary principle has been acted on in analogous cases. *Harper v. Faulder*. (a) Here what has happened has in no degree arisen from * the * 271 want of notice, or of a stop order. If there had been no settlement at all, it would have been the same to the surety.

They also referred to *Curtis v. Drought*, (b) *Wilkinson v. Candlish*. (c)

Mr. Malins, in reply.

Judgment reserved.

June 9.

THE LORD JUSTICE KNIGHT BRUCE. — Before proceeding to state the manner in which this case, as it appears to me, ought to be disposed of, I think it right to observe that—though, by the nature of the controversy and the relevant evidence before the Court, it is rendered fit and right, that I should express an opinion upon the conduct of one of the witnesses—not as a witness merely, but as a member of society, and a professional man (he is a solicitor, I believe, of the Court of Chancery)—upon his conduct, I mean of course, as seeming to me proved by the materials in this litigation—we should yet remember that, in a sense at least, it is proved only as between the parties to the present suit, one of whom he is not; that, in a sense at least, the witness, though he has been not simply examined, but cross-examined and re-examined, may perhaps be thought not to have had an opportunity of defending himself, and that it may be considered possible that he may, so far as his reputation and personal interest are concerned, clear himself of the imputations, to which there is at present presumptively or *prima facie* ground, in my opinion, for suspecting him at least to be liable.

(a) 4 Mad. 129.

(b) 1 Moll. 487.

(c) 5 Exch. 91.

* 272 * The question for our determination now is, whether the late and present plaintiffs' share of the fund in Court in another cause—the suit of *Morrison v. Jefferies*—has been discharged wholly, or to some extent, from its liability for the debt of Mrs. Wheatley's brother, Mr. Barratt, to the defendant Mr. William Bastow, which by way of suretyship for her brother, she created by the deed of 1841, mentioned in the pleadings; that is to say, has, independently of payment or satisfaction, been so discharged by the conduct of some or one of the defendants; and the points made by the original plaintiff Mrs. Wheatley, and her husband, and administrator, the present plaintiff, in support of the affirmative of the proposition are: First, that though Mr. William Bastow, on his marriage in 1846, assigned the debt and the benefit of the security for it to the trustees of his marriage settlement, neither was a stop order obtained on the footing of that assignment, nor was notice of it given to Mrs. Wheatley or her husband; and, secondly, that if the discharge was not so effected, it was effected wholly, or to the extent at least of the alleged 500*l.* mentioned in the petition, which was the foundation of the order of the 18th of December, 1846, by that petition and that order, and the consequent abstraction for the purposes, and application to the use of Mr. Barratt and Mr. Collins, or one of them, of Mr. Barratt's share of the fund.

Of these points one at least appeared to me, during the argument, not to be free from difficulty; but, upon reflection, I am well satisfied that, on each of them, the case of the original plaintiff, were she alive, would, and that of the present plaintiff does, fail. Mrs. Wheatley, who executed the deed of 1841, before her marriage, did certainly by that deed charge her share of the fund (the share in controversy), by way of suretyship merely, for

* 273 * her brother, Mr. Barratt, whose share, also charged, was, as between them at least, primarily applicable for paying off the incumbrance so created. The deed, on the face of it, showed the circumstances to be so; and, therefore, if, from the evidence before us, it had appeared that the brother's creditor, the defendant Mr. William Bastow, in whose favour the charge was made, and the three trustees of his marriage settlement, to whom he assigned the charge, or any one of the four, had participated in the transaction of obtaining from the Court the property obtained from it by means of the order of the 18th of December, 1846, or had been

connected or associated with it or privy to it, I might possibly have held the plaintiff to be right in his contention.

But the evidence shows no such thing; and, on the contrary, it proves that Mr. Bastow and his trustees were wholly strangers to the matter. True, the order, which makes no mention of the trustees at all, nor purports to have been made with the consent of Mr. Bastow, does purport to have been made on his appearance, and does not intimate any opposition upon his part. But this was the unauthorized, and it must, I fear, be added, the highly improper act of Mr. Collins, who unwarrantably permitted himself to instruct counsel on the occasion as for Mr. Bastow. He, as I have said, gave no direction, nor was consulted. Doubtless there are instances in which a man, for whom a solicitor or legal agent has appeared, and acted in a Court of justice without authority from the alleged client, is for some purposes disabled from asserting effectually as between him and a third person, that the solicitor or legal agent did act without authority. Whatever the hardship in particular cases, it is obvious that this must sometimes be.

The reason or principle, however, on which such instances * proceed, has, I think, no application in the present dis- * 274 pute. The evidence appears to me to show that Mr. Wheatley (who married Mrs. Wheatley in June, 1846) was, before and when the order was obtained and the transaction completed by the solicitor's possession of the abstracted property, as ignorant of the order and transaction, and as much a stranger to it, as Mr. Bastow, though the order purports to be made on the appearance not only of that gentleman, but also of Mr. and Mrs. Wheatley, and she certainly did not before her marriage, nor he, before or after it, authorize the step, or become privy to it, or to any such intention. This also was the much more than irregular act of Mr. Collins. The whole transaction was a mere fraud, so far as it affected or was designed or calculated to affect Mr. Bastow, and his trustees, and Mr. and Mrs. Wheatley, or any one or more of them,—a fraud, the nature and character of which were much the same, as to the six, but were exactly the same as to Mr. Bastow and Mr. Wheatley, for it makes no difference that Mr. Collins, who was probably not the general solicitor of his nephew-in-law the plaintiff, did stand in that position towards Mr. Bastow, as to whom the conduct of Mr. Collins in the matter was as wrong and indefensible, as if they had never seen or heard of each other. Nor can the plaintiff

derive any benefit from the untrue assertion of the payment of 500*l.* contained in the petition (I must, I fear, say the fraudulent petition), which was the foundation of the order. I may add, in passing, the remark, sufficiently obvious, that the plaintiff's case would not be assisted, were we to ascribe to Mrs. Wheatley, at any time after her marriage, either knowledge or approval of the transaction, or of the intention that it should take place. But I am not, upon the evidence, satisfied that this ought to be done. If

Mrs. Wheatley and her brother, instead of giving the security which they did give to Mr. Bastow, had pledged * 275 and deposited with him jewels, — some belonging to the lady, some to her brother, and the latter had been stolen from Mr. Bastow, without any negligence or fault on his part, could it have been reasonably said that Mr. or Mrs. Wheatley was, therefore, entitled to have her jewels restored without paying the debt for which they were pledged? I apprehend not; nor do I, for any present purpose, see any substantial difference between such a case and that now before the Court.

It is argued, however, that Mr. Bastow and his trustees acted negligently and faultily in not obtaining a stop order founded on the trustees' title, and not apprising Mrs. Wheatley or her husband in any manner of it. To that position I am unable to accede. The debt in question was not legally assignable, and when a debt, not legally assignable, has been assigned in the only manner in which it can be, that is to say, equitably, and the debtor has not notice of the assignment, he may, of course, pay the assignor as safely and effectually for all purposes of the debtor as if the assignment had not been made,¹ and generally,

¹ Until notice of the assignment, the rights and interests of the debtor are in no way affected by it. *Loomis v. Loomis*, 26 Vt. 198; *PARSONS C. J.*, in *Comstock v. Farnum*, 2 Mass. 95. If, in the mean time, and before such notice, the debtor pays the debt to the assignor, or his subsequent assignee, he will be discharged. *Jones v. Witter*, 13 Mass. 304; *Stocks v. Dobson*, 19 Eng. Law & Eq. 96; *Ward v. Morrison*, 25 Vt. 593. It is the notice of the assignment that binds the debtor, and devolves on him an equitable obligation in favor of the assignee. The assignment operates between the assignor and assignee only, until the act of notice takes place which brings the debtor into the arrangement. *PARKER C. J.*, in *Jones v. Witter*, 13 Mass. 304, 307; *Crocker v. Whitney*, 10 Mass. 316, 319; *Mowry v. Todd*, 12 Mass. 281; *MORTON J.*, in *Parkhurst v. Dickerson*, 21 Pick. 310. Special notice, however, is not necessary; it is enough, if the party to be affected has such knowledge of facts and circumstances

therefore (if not universally), is, I apprehend, not entitled to complain of the want of notice. Mrs. Wheatley does not seem to have become in the ordinary sense indebted to Mr. Bastow, but had she or her husband, for the purpose of redeeming her share of the mortgaged property paid to Mr. Bastow after the settlement made by him, but without notice of it, and in the absence of a stop order founded on it, the amount secured, that would have entitled the plaintiff or his wife to have the share restored just as if the settlement had not existed, a proposition too clear and too well recognized to render a reference to *Mathews v. Walwyn* or any other authority necessary.

That the trustees of it have rendered, if they have * rendered themselves personally liable to the wife and * 276 children of Mr. Bastow for the debt, is not, I think, material in this controversy, nor can I suggest to myself any reason for holding that the mere circumstance of assigning a debt, or a security for it, and omitting to give notice to a surety or to a person whose property is mortgaged by way of suretyship for the debt, discharges the surety or the property.

It does not appear to me that there has, on the trustees' part, or on that of Mr. Bastow, been a failure in performing any duty which they or which he owed to Mrs. Wheatley or the plaintiff, as between whom and Mr. Bastow and the trustees it was, in my opinion, well allowable for the latter to incur, if they chose to incur, the risk of Mr. Bastow committing, if disposed to commit, the very improper act of receiving or discharging the assigned debt as if he had not assigned it; no such thing, however, having been done or attempted by him.

It was suggested, that if a stop order had been obtained by the trustees the fraud would not have been committed. This seems to me, however, mere matter of speculation or conjecture; and I

as ought to induce a reasonable belief of the fact. *Anderson v. Van Alen*, 12 John. 343; *Parris J. in Hackett v. Martin*, 8 Greenl. 88, 89; *U. States v. Sturges*, 1 Paine C. C. 525; *Kellogg v. Krauser*, 14 Serg. & R. 137. It is not necessary that the assignee should exhibit the security to the debtor, or offer other evidence of the assignment, when it is not demanded of him for the proper satisfaction of the debtor. *Bean v. Simpson*, 16 Maine, 49; *Davenport v. Woodbridge*, 8 Greenl. 17; *Johnson v. Bloodgood*, 1 John. Ch. 51. It is not necessary that the debtor, having notice, should concur in the arrangement. *Bell v. London and North-Western Railw. Co.*, 21 Eng. Law & Eq. 566; *Spring v. So. Car. Ins. Co.*, 8 Wheat. 268.

think it rather probable, that Mr. Collins, who conducted himself as he did in the actual circumstances, would not have allowed an additional stop order to stand in his way; but this, as I have said, cannot be known.

I am (I repeat) satisfied that it was no breach of duty to Mrs. Wheatley or the plaintiff not to obtain such a stop order. The trustees claim only the rights of Mr. Bastow. He claims for them and himself only those rights which he would have had if he had made no assignment; nor can I perceive any reason why he should not.

* 277 * I think, therefore, that our order must be on this footing, one for redemption or dismissal; but that we cannot, in the proper execution of our duty, part thus with the case, so far as it seems to affect Mr. Collins, as to whom it must, I repeat, particularly be understood that all that I have said is merely on the footing of the evidence now before us, considered as evidence between others, though part of that evidence has been given by himself.

Before a case can be deemed to be substantiated against Mr. Collins personally and directly, he must have an opportunity of being heard as an accused person and adducing evidence for himself. When he shall be so heard, when the evidence shall be so adduced, he may possibly appear blameless. But the materials at present before the Court are such as to make it, in our judgment, incumbent on us to take the course taken by Lord ROSSLYN in *Dungey v. Angove*, (a) by ordering Mr. Collins to

(a) Reg. Lib. 1793, A. fol. 150. LORD CHANCELLOR. Tuesday, 28th January, 1794.

DUNGEY v. ANGOVE.

His Lordship doth order and decree that the 227l. 3s. 4d., cash in the bank in this cause, be paid to the defendant Peter Angove, and for payment thereof the accountant-general is to draw on the bank, according to the form prescribed by the Act of Parliament and the general rules and orders of this Court in that case made and provided. And it is ordered that it be referred to Mr. EAMES, one of the Masters of this Court, to inquire by whose direction and at whose instigation the bill in this cause was filed, and the answers to it put in, and whether notice of the ejectments served on the plaintiff Thomas Dungey was given to the defendants Peter Angove and William Angove, or either and which of them, and when, and by whom, and what proceedings were had on those ejectments, and in order to the said inquiries the parties, and particularly the plaintiff Thomas Dungey, the defendant John Hurnall, and Anthony Stevenston,

* show cause why, upon the matters now appearing, he * 278 should not be struck off the roll of solicitors of this Court, for upon that roll I suppose him still to be. The proceeding will be prosecuted by the solicitor to the suitors' fund. (a)

THE LORD JUSTICE TURNER. — The short point which has been decided by the Vice-Chancellor in this case is that, where a creditor has security upon the equitable interests of his debtor, and of a surety in a trust fund, and assigns the debt with the * securities for the same, the assignee loses his right against * 279 the interest assigned by the surety, unless the surety has notice of the assignment; and his Honor has rested this conclusion upon the ground that the surety is entitled to the benefit of all the securities which the creditor has against the principal debtor, and ought, therefore, to be informed who the creditor from time to time may be.

of Castle Street, Holborn, one of the solicitors of this Court, and also John Wallis, of Bodmin, in the county of Cornwall, one of the solicitors of this Court, and stated by the said Anthony Steventon to be the solicitor for the plaintiff in this cause, are to be examined upon interrogatories, and are to produce before the said Master upon oath all deeds, books, papers, and writings in their custody or power relating thereto, as the said Master shall direct. And it is ordered, that the said Master do state the several examinations of the plaintiff Thomas Dungey, and the defendant John Hurnall, and the said Anthony Steventon and John Wallis, and all facts and circumstances as shall appear to him material to the Court. And his Lordship doth reserve the consideration of the costs of this suit, and of all further directions, until after the said Master shall have made his report, and any of the parties are to be at liberty to apply to this Court as they shall be advised.

Reg. Lib. 1793, A. fol. 543. LORD CHANCELLOR. Tuesday, the 5th of August, 1794.

DUNGEY v. ANGOVE.

Upon opening and debate of the matter and hearing the said decree dated the 28th day of January, 1794, and the said Master's said report, dated the 11th of July, 1794, read, and what was alleged by the counsel on both sides, his Lordship doth order, that the said Master to whom this cause stands referred do tax the defendants, the Angoves, their costs of all the inquiries before the said Master, such costs to be taxed as between solicitor and client. And it is ordered, that such costs, when taxed, be paid to Mr. Charles Sheppard, their solicitor, by the plaintiff Thomas Dungey, and Anthony Steventon. And it is further ordered, that the said Anthony Steventon be struck off the roll of solicitors of this Court, unless he shall, on the first day of next Michaelmas term, show unto this Court good cause to the contrary.

(a) See *Re Collins*, *post*, 558.

This point, so far as I am aware, is wholly new, and it is certainly of great importance, as it introduces a new element into the consideration of the cases of principal and surety. In the absence of authority we can determine the question only upon principle. It must depend upon what are the relative obligations of the creditor, the assignee, and the surety, arising out of the relation which subsists between them.

The creditor is, no doubt, under the obligation of preserving the securities, which he takes from the principal debtor, for (as observed by the Vice-Chancellor) the surety may entitle himself to the benefit of those securities, and if any of them be lost by the act or default of the creditor, the surety may be wholly or partially discharged,¹ but the creditor enters into no contract with the surety not to assign the debt or the securities. The law gives him the right to assign them; and if he does so assign them, the obligation which attached upon the creditor attaches upon the assignee. The position of the surety is in no respect altered. The assignee, on the other hand, acquires by the assignment all the rights of the assignor, and it is difficult, I think, to see how the surety can be in a better position against the assignee than he was in against the assignor.

The surety, it is said, has the right to know who is the
 * 280 * assignee; but, admitting this right, the question still remains, is the right of the assignee against the surety destroyed because the fact of the assignment has not been communicated to him? On whom does the law cast the *onus* of finding the creditor? Generally speaking, as I conceive, upon the debtor;

¹ See Chitty Contr. (10th Am. ed.) 583; *Law v. East India Co.*, 4 Ves. 824; *Capel v. Butler*, 2 S. & S. 457. A creditor who has his debt secured by a surety, and has also property pledged to him by the principal debtor as security, is bound to keep the property for the benefit of the surety as well as of himself; and if he surrender the property without the knowledge and consent of the surety, he loses his claim against the surety to the extent of the property given up. *Baker v. Briggs*, 8 Pick. 122; *Bank of Manchester v. Bartlett*, 13 Vt. 315; *Lichtenthaler v. Thompson*, 13 Serg. & R. 157; *N. Hamp. Savings Bank v. Colcord*, 15 N. H. 119; *Watriss v. Pierce*, 32 N. H. 560, 573; *La Farge v. Hester*, 11 Barb. (N. Y.) 159; *Taylor v. Morrison*, 26 Ala. 728; *Neimecwiez v. Gahn*, 3 Paige, 614; *Smith v. Tunno*, 1 McCord Ch. 443. The fact that other security, as good or better than that surrendered, was substituted for it, will not preclude the surety from availing himself of the discharge. *N. Hamp. Savings Bank v. Colcord*, 15 N. H. 116.

but, apart from this consideration, the surety, if he has no notice of the assignment, may pay the creditor, and the payment, as I apprehend, will be perfectly good against the assignee;¹ and if, upon the payment being made or tendered, the creditor be required to deliver, and does not deliver any securities held by him, the surety would, no doubt, be entitled to relief in this Court, and to stay any proceedings by the creditor. It is to be remembered in these cases, that a surety though a favoured debtor is still a debtor, and that he may at any time relieve himself by paying the debt; and further, that if notice to the surety of the assignment of the debt be held to be necessary, serious impediments to assignments by creditors may in many cases be created.

Upon these grounds I feel compelled, in the absence of authority, respectfully to dissent from the opinion which the Vice-Chancellor has expressed, and to hold that the plaintiff's fund has not been discharged upon the grounds on which the Vice-Chancellor has relied.

Upon the rest of the case I have but little to say, for I agree in opinion with the Vice-Chancellor that no decree in favour of the plaintiff can be made upon the case stated by the bill. There is no sufficient evidence to support that case.

The case as it really stands upon the evidence is this: The plaintiff and her brother being entitled to shares of a fund in Court, subject to the life-interest of their mother, assigned their shares of the fund for securing *1000*l.* advanced by *281 Bastow to the brother, the plaintiff joining as surety merely, and being so described in the assignment. A stop order was obtained by Mr. Bastow. He afterwards assigned the 1000*l.* and the securities for it to the trustees of his marriage settlement. The trustees rested upon the stop order obtained by Bastow, and did not themselves put a stop upon the fund.

After the assignment to the trustees, the brother's share of the fund was got out of Court upon a petition presented in the name of the brother and the mother, representing that 500*l.* had been paid by the brother to Mr. Bastow; and Mr. Collins, the solicitor by whom the petition was presented, without the authority and without the knowledge of Mr. Bastow, of the plaintiff's husband or probably of the plaintiff herself (although this is not material

¹ See *ante*, 275, and note (1) and cases cited.

as she was then married), appeared for them upon the petition and consented to it, or did not oppose it.

In this state of circumstances the plaintiff's case was rested in argument upon two points: first, that the plaintiff's share of the funds was not intended to be, and was not liable for any deficiency arising from an improper disposition of the funds under the order of the Court; that the plaintiff was not, as it was said, a guarantee for the Court of Chancery;—and secondly, that the defendant Bastow, and the trustees of his settlement, claiming under him, were bound by the statement made by Collins in the petition presented to the Court, that 500*l.* had been paid to Bastow, and by the other acts of Collins; and the case of the *Duke of Beaufort v. Neeld* was cited upon this latter point.

But with respect to the first point, I think that the plaintiff's share of these funds was a security generally
 * 282 * for the moneys advanced by Bastow, and must be answerable for the deficiency of those moneys, from whatever cause other than the act or default of Bastow, or of those claiming under him, that deficiency may have arisen; and, as to the second point, I think that, as the case stands upon the evidence, it is clear that Collins had no authority either for the statements which he made in the petition or for the acts which he did, and that neither Bastow nor those claiming under him can be bound by those statements or acts. In the case referred to, the agent was a general agent for the purpose of dealing with the property in question; the solicitor in this case does not appear to me ever to have stood in that situation.

If the plaintiff desires it, there may be an account of what has been received by Bastow or the trustees in respect of the 1000*l.* and interest, and of what remains due in respect thereof and a decree for re-transfer on payment of what is due, but the rest of the bill must be dismissed, and if the plaintiff does not take the account the whole bill must be dismissed. In either case the plaintiff must pay the costs.

* BULLOCK v. BENNETT.

* 283

1855. June 9, 12. Before the LORDS JUSTICES.

A testator had a daughter who, at the date of his will, was a widow, having been twice married. By his will, dated after the Wills Act came into operation, he gave a sum of stock upon trust to pay the income to her for her life or until her marriage, and after her decease or her marriage, which should first happen, upon trust for her children by both her late husbands. After the date of the will the daughter married a third time, with the knowledge and approbation of the testator, who however died without republishing his will: *Held*, that the daughter took no interest under it.¹

The provision in the Wills Act, that the will is to be construed as if made immediately before the testator's death relates only to the property comprised in the will.

THIS was an appeal from the decision of Vice-Chancellor Wood, upon a special case submitted to the Court, in order to determine the construction of the will of Samuel Bullock, dated the 1st of July, 1852, whereby, after directing all his estate to be converted into money, he gave 1200*l.* to trustees upon trusts expressed as follows : —

“ Upon trust to pay the income thereof to my daughter Mary Ann for her life, or until her marriage, and after her decease or marriage, which shall first happen, upon trust as to the sum of 900*l.*, part of the said sum of 1200*l.*, for William Bennett and Sarah Ann Maria Bennett, children of my said daughter Mary Ann by her late husband William Bennett, in equal shares, and as to the sum of 300*l.*, further part of the said sum of 1200*l.*, to pay and divide the same equally between Ann Bullock, Mary Smith, and Susannah Wilce, children of the said Mary Ann Bennett by her former husband Thomas Wilce.”

At the time of the date and execution of the testator's will, his daughter Mary Ann was a widow, having, as was mentioned in the will, been twice married, first to Mr. Wilce and next to Mr. Bennett. After the date of the will, on the 21st of February, 1853, in the lifetime of the testator, she married the defendant Joseph Morris.

¹ See 2 Jarman Wills (3d Eng. ed.), 46.

* 284 * The testator died on the 11th of March, 1853, without having republished his will after the solemnization of his daughter's third marriage.

These facts were stated in a special case, in which the trustees were named as plaintiffs, and the children of the testator's daughter Mary Ann by her first and second husband, as well as Mary Ann herself, and her third husband, as defendants.

The questions for the opinion of the Court were: first, what interest the defendants, the children, took under the will of the testator in the 1200*l.* bequeathed by him in trust; and secondly, whether the defendant Mary Ann Morris took any, and if any, what interest under the will in the same sum of 1200*l.*

The case was argued before the Vice-Chancellor, and adjudged by his Honor upon the assumption that the testator's daughter married the defendant Morris with the knowledge of the testator.

The Vice-Chancellor held that the daughter continued entitled to the income of the fund, notwithstanding her third marriage. The case is reported below in the 1st volume of Messrs. Kay and Johnson's Reports. (a)

From this decision the children appealed.

Mr. Rolt and *Mr. Faber*, in support of the appeal, referred to *Willing v. Baine*, (b) *Humphreys v. Howes*, (c) *Rishton v. Cobb*, (d) and *West v. Kerr*. (e)

Mr. W. M. James and *Mr. G. M. Giffard*, for the * 285 * defendants Morris and his wife, referred to *Crommelin v. Crommelin*, (g) *Wheeler v. Warner*. (h)

Judgment reserved.

June 12.

The Lord Justice TURNER, after stating the will and the facts, said: We so generally agree with the Vice-Chancellor, that, although I felt during the argument a strong impression adverse to the judgment, I desired further to consider before venturing to differ from it. Having now further considered the question, I

(a) Page 315.

(b) 3 P. W. 113.

(c) 1 Russ. & M. 639.

(d) 5 Myl. & Cr. 145.

(e) 6 Ir. Jur. 141.

(g) 3 Ves. 227.

(h) 1 S. & S. 304.

feel myself compelled to dissent from the Vice-Chancellor's decision.

Questions of this nature must depend upon the language and context of the instrument, and the point to be ascertained here is, whether the testator is referring to the state of circumstances as they existed at the date of the will, or as they might exist at the time of his death.

I state advisedly that, in my judgment, this is the point, notwithstanding the late Wills Act, which, by its 24th section, enacts, that every will shall be construed with reference to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. It is "with reference to the real and personal estate comprised in it" that the will is to speak, as if executed immediately before the death of the testator. I understand this to mean, not with reference * to the objects * 286 of the testator's bounty, who are to take the real and personal estate, but with reference to the real and personal estate, which is to be taken by those objects. Had it been intended otherwise, the words with reference to the real and personal estate would hardly, if at all, have been required to be inserted.

The statute, therefore, does not in my opinion affect the case, and we must consider the question on the language and context of the will. Now, according to the dispositions of the will, the trustees are to pay the income to the daughter during her life, or until her marriage. It was present therefore to the testator's mind when he made his will, that she was not at that time married, and he has made this more clear by ulterior dispositions, by which he has given the fund after her decease or marriage to the children of her first and second husband. Are we then to understand a testator, who thus speaks of his legatee as not being married, to refer, when he speaks of her future marriage, not to her next marriage, if it should take place in his lifetime, but to any future and subsequent marriage which may take place after his decease? I think not, but that we must apply the words which the testator uses to what his will shows to have been passing in his mind at the time. He demonstrates that he was referring to the circumstances as they then stood, and we must apply his words to those circumstances.

The Vice-Chancellor seems to have placed some reliance on the circumstance of testator having approved the marriage. But this circumstance does not seem to me to be material. He might approve the marriage, and still intend the dispositions of the will to take effect. It seems probable indeed that this was his intention, for the dispositions over are in favour of children of * 287 the * former marriages, for whom the daughter might be disabled from providing by the third marriage. With respect to what might have been the effect of the disposition if the testator had republished his will after the marriage, it is unnecessary to give any opinion, and I give none; but the absence of republication certainly does not aid this lady's case.

Some authorities were referred to on the part of this lady in the course of argument; but they were cases in which the provisions of the will applied to marriages with the consent of trustees appointed by the testator's will, and, the marriages afterwards having taken place in the lifetime of the testator, the legatees were held to be entitled. Those cases do not seem to me to touch the present. The plain intention in such cases is to provide for the event not of any marriage, but of an improvident marriage; and the consent of the testator proves that he did not consider the marriage to be improvident. But here the provision in the will applies to any marriage, whether provident or improvident. So far as they go, however, these cases seem to be rather against than in favour of the lady, for I can find no trace in them of its ever having been supposed that the legatees could take if the marriage was without the testator's consent, and yet they would be so entitled if the will was to be construed as referring only to marriages after the death of the testator. The answer to the case will be altered as I have mentioned.

The Lord Justice KNIGHT BRUCE concurred.

[222]

* WATSON v. LYON.

* 288

1855. May 26. June 12. Before the LORDS JUSTICES.

A mortgagor instructed his solicitors, to whom he was indebted in a bill of costs, to prepare a reconveyance of the mortgaged property. They did so, and sent the engrossment to the mortgagees' solicitors, with an intimation that they had a lien on it, and a request that the mortgagees' solicitors would hold it on account of the mortgagor's solicitors. The engrossment was executed by the mortgagees. The mortgage-money was not paid, but the mortgagor sold the property to purchasers who agreed to pay it: *Held*, that the mortgagor's solicitors had a lien on the engrossment,¹ and that such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solicitors not covering their whole demand,² and that the purchaser had been properly restrained by injunction from proceeding at law to recover the deed.³

THIS was one of the first petitions of appeal from the Court of Chancery of the Duchy of Lancaster under the recent Act 17 & 18 Vict. c. 82. It was addressed to "The Right Honourable the Chancellor of the Duchy and County of Lancaster and their Lordships the Lords Justices of the Court of Appeal in Chancery."

The bill was filed in the Duchy Court of Lancaster by Messrs. Watson and Webster, solicitors, at Liverpool, against Messrs. Lyon and Ryder, mortgagees of an estate called the Clifton estate, belonging to a gentleman of the name of Sharp, and against John Walker and William Walker, purchasers of a villa called Laurel Villa, built upon the Clifton estate, for the delivery to the plaintiffs, Watson and Webster, of a deed of reconveyance of Laurel Villa to Sharp, which was executed by Lyon and Ryder, and remaining in the hands of Messrs. North & Orred, their solicitors; and for an injunction to restrain the delivery of the deed to the defendants, the Walkers, without the consent of the plaintiffs; and also to restrain the defendants, the Walkers, from proceeding at law against Lyon and Ryder for the recovery of the deed.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1843.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1845.

³ Kerr Inj. 195.

The circumstances which gave rise to the suit are
 * 289 * shortly these: Sharp became purchaser of the Clifton estate. He mortgaged it to Lyon and Ryder, and afterwards built Laurel Villa upon it. It was afterwards agreed between Lyon and Ryder and Sharp, that Lyon and Ryder should release from the mortgage the portion of the mortgaged estate which consisted of Laurel Villa, and should reconvey that portion to Sharp upon payment of 398*l.*, part of the money due upon the mortgage.

The plaintiffs Watson and Webster were then and had for some time previously been the solicitors of Sharp, who was largely indebted to them for costs. They prepared the reconveyance of Laurel Villa, and paid for the stamps upon it. On the 3d September, 1851, they forwarded it (with another reconveyance of another part of the estate, as to which no question arose) to Messrs. North & Orred, the solicitors of Messrs. Lyon and Ryder, accompanied by the following letter:—

“September 3d, 1851.

“Lyon to Sharp.

“Dear Sir,—The drafts were made in strict conformity with the opinion of Mr. Croke, which I sent you; I, therefore, had them engrossed, and now send them for execution by the mortgagees. As Watson and Webster have a lien on the deeds, and I also have a lien on them individually, you will be good enough to hold them on our account.

“I am truly yours,

JAS. OTLEY WATSON.

“Messrs. North & Orred,

“Solicitors.”

Lyon and Ryder thereupon executed the deed of reconveyance, and the deed afterwards either remained in the hands of North & Orred, or was put into the hands of Messrs. Crook, other agents of Lyon and Ryder.

Sharp subsequently, on the 21st of November, 1851,
 * 290 * agreed to sell Laurel Villa to the defendants, the Walkers,

and by the terms of this agreement the Walkers were to pay Lyon and Ryder the 398*l.* The defendants, the Walkers, accordingly offered to pay Lyon and Ryder the 398*l.* upon having the deed of reconveyance delivered to them; but, in consequence of the plaintiffs' claim, the deed was not delivered, and the money was not paid.

In December, 1851, Sharp came to a settlement of account with the plaintiffs, in respect of what was due from him to them for costs down to the 1st of September, 1851, and he gave the plaintiffs his promissory note for the balance which was due from him on the settlement of that account; but in the month of March, 1852, he became bankrupt, without having paid the amount due upon the note.

An attempt was made, after the bankruptcy, to bring the matter to a settlement, the defendants the Walkers offering to pay the costs of preparing the reconveyance, and what had been paid for the stamps upon it, but this offer was declined; and, ultimately, by a deed dated the 12th of June, 1854, Sharp and his assignees conveyed the villa to the defendants the Walkers, who immediately gave notice of the conveyance to Messrs. North & Orred, and demanded from them the deed of reconveyance, and in consequence of this notice and demand the bill was filed in the present suit, stating, among other things, to the above effect, and also stating that shortly after the forwarding of the engrossments of the reconveyances by Messrs. Watson and Webster to Messrs. North & Orred, the plaintiff G. Webster had an interview with Mr. Orred of the firm of North & Orred, as such solicitors of the defendants John Lyon and James Ryder as aforesaid, and that Mr. Orred then promised the plaintiff G. Webster that their (viz. Messrs. * North & Orred's) clients would not part with the * 291 reconveyances except in accordance with the letter of the 3d of September, 1851. The bill charged that no money or other valuable consideration was paid or given by the defendants John Walker and William Walker for the conveyance to them, or for the agreement upon which it was founded, at or subsequently to the several times of the execution thereof respectively, and that, in fact, the only consideration for such conveyance and agreement respectively was some antecedent debt, alleged to have been owing by William Sharp to the defendants John Walker and William Walker at the date of the agreement; and the bill also charged, that before and at the date of the conveyance and agreement respectively, the defendants John Walker and William Walker had actual or constructive notice of the fact that the reconveyance of the 6th of September, 1851, was in the possession of the defendants John Lyon and James Ryder, or of their solicitors Messrs. North

& Orred, and of the circumstances under which they held possession thereof, and of the lien thereon to which the plaintiffs were entitled as aforesaid; and that if at the date of the conveyance to the Walkers they had not actual notice of the existence of the plaintiff's lien, at all events they might and would have had such notice if they had made the inquiries which they ought to have made. The prayer was that the defendants John Lyon and James Ryder might be decreed to deliver up to the plaintiffs the reconveyance of the 6th of September, 1851, then in the possession of the defendants or of their solicitors, the plaintiffs submitting, upon the delivery up thereof to them as aforesaid, to pay to the defendants John Lyon and James Ryder the unpaid consideration of 398*l.*, with such interest thereon as the Court might direct; and that the defendants John Lyon and James Ryder might be

* 292 restrained from delivering up the reconveyance * of the 6th of September, 1851, to the defendants John Walker and William Walker without the previous consent of the plaintiffs.

The defendants the Walkers, by their answers, set forth the agreement between them and Sharp for the purchase dated the 21st of November, 1851, by which they agreed to become purchasers of the land and villa, and to pay what was due in respect of the 398*l.*; and that it was provided by the agreement that the Walkers were to have the option of paying for the land and taking up the conveyance at any time.

Among the affidavits filed on behalf of the defendants the Walkers was one of Mr. Sharp, stating that the plaintiffs had never requested him to give them any lien on the deed of reconveyance of Laurel Villa, and that he never agreed to give them any lien thereon, and he never heard of their claiming any lien thereon, or of the letter of the 3d of September, until some time after the 6th of January, 1852. That in the month of December, 1851, he had a settlement of the accounts with the plaintiffs, and gave them a promissory note for the balance due to them, and he did not believe any mention was then made of any lien on the deed relating to Laurel Villa. That he always believed that the deed of reconveyance would be handed over to him on payment of the 398*l.*

The plaintiff Mr. Watson, however, stated by his affidavit that he verily believed, that on the 24th of December Mr. Sharp was

perfectly aware of the lien which the plaintiffs claimed, inasmuch as he had, previously to the 24th of December, as the deponent verily believed, endeavoured to get possession of the deed in question, * which Mr. Orred refused to deliver up, on * 293 account of the letter of the 3d of September.

The case was heard before the Vice-Chancellor of the Duchy, on a motion for a decree, on the 2d of February, 1855.

The order under appeal was then made, which directed that the district registrar should tax the defendants John Lyon and James Ryder their costs of this suit, and then proceeded as follows: "And the plaintiffs paying to the defendants John Lyon and James Ryder, on or before the 2d of August next, the sum of 398*l.*, with interest thereon after the rate of 4*l.* per cent per annum, to be computed from the 6th of September, 1851, up to the day of the payment thereof; and the costs as taxed, the amount of such principal, interest, and costs, to be verified by affidavit; it is ordered that the defendants John Lyon and James Ryder do deliver up to the plaintiffs, or as they shall direct, the indenture of reconveyance of the 6th of September, 1851, in the pleadings mentioned: and it is ordered, that an injunction be awarded and issued to restrain the defendants John Walker and William Walker from commencing or prosecuting any action at law against the defendants John Lyon and James Ryder, or their solicitors, to obtain the possession or delivery up of the said indenture; but in default of the plaintiffs paying to the defendants John Lyon and James Ryder such principal, interest, and costs, on or before the 2d of August next, it is ordered that the plaintiffs' bill be dismissed out of this Court, with costs, to be taxed by the district registrar, and to be paid by the plaintiffs; and any of the parties are to be at liberty to apply to this Court, as there shall be occasion."

The defendants the Walkers appealed from this decree, * and, by their petition of appeal, submitted that the bill * 294 ought to have been dismissed with costs.

Mr. Little and *Mr. E. R. Turner* appeared for the plaintiffs.

Mr. Giffard and *Mr. Druce*, for the appellants. — The nature of the arguments appears sufficiently from the judgments.

The following authorities were referred to: *Man v. Shiffner*, (a) *M^cCombie v. Davies*, (b) *Ex parte Roberts*, (c) *Cowell v. Simpson*, (d) *Balch v. Symes*, (e) *Stevenson v. Blakelock*, (g) *Jacobs v. Latour*, (h) *Ramsbottom v. Wallis*, (i) *Smith v. Chichester*, (k) *Blunden v. Desart*, (l) *Clark v. Gilbert*, (m) *Pelly v. Wathen*. (n)

Judgment reserved.

June 12.

THE LORD JUSTICE KNIGHT BRUCE. — I think it unnecessary in this case to give an opinion, whether the plaintiffs, as between themselves and Messrs. Lyon and Ryder, or whether Messrs. Lyon and Ryder had or have reason to be dissatisfied with the decree under appeal, for we may fairly and properly assume that the plaintiffs, as between themselves and Messrs. Lyon and Ryder, and Messrs. Lyon and Ryder, are satisfied with it. The only question in controversy is whether, as between the plain-
* 295 tiffs and the appellants, * the decree is correct. And in this point of view, considering the words "on our account" contained in the letter of the 3d of September, 1851, and the circumstances and manner in which the parchment in dispute (now a deed) was transmitted by the plaintiffs to the solicitors of Messrs. Lyon and Ryder, I think that if, upon the supposition that the parchment had not left the hands, but had remained in the actual possession of the plaintiffs, they (the plaintiffs) would now have had a lien upon it rightfully and availably against the appellants, they (the appellants) cannot be heard to say that it ought not now to be redelivered by Messrs. Lyon and Ryder in its actual state to the plaintiffs.

The point then to be determined is, whether a debt is due to the plaintiffs for which, if they had not parted with the actual possession of the deed, they would, as between themselves and the appellants, have had a lien upon it, and a right therefore to retain

(a) 2 East, 523.

(e) T. & R. 87.

(b) 7 East, 5.

(g) 1 M. & S. 535.

(c) 2 Mac. & Gor. 192.

(h) 5 Bing. 130.

(d) 16 Ves. 275.

(i) Coote on Mort., App. 576; 5 Law J., N. S., Ch. 92.

(k) 2 Dr. & War. 393.

(m) 2 Bing. N. C. 343.

(l) *Ib.* 405.

(n) 7 Hare, 351; 1 De G., M. & G. 16.

it until payment or tender of the debt. And upon the facts and the law applicable to them, this point must, I think, be decided in the plaintiffs' favour.

The amount of the debt, the extent of the lien, we have not to determine, that is not the office of the present suit, at least without the consent of the appellants, which consent has not been given. It may be, however, and probably is, true that, for any debt incurred after the contract of sale to the appellants of November, 1851, under which they claim, there could not have been nor can be any lien available against them. It may be also that the promissory note for 619*l.* 17*s.* 10*d.* given in December, 1851, diminished to a certain extent the plaintiffs' right of lien. Each of these points, without deciding either of them, I assume to be properly determinable in the appellants' favour; but the assumption still, in my judgment, as I * have said, leaves * 296 the plaintiffs' case sufficient to support their bill.

I think the decree substantially right, subject only to these two remarks: first, that I doubt whether, in respect of costs, it might not well have been more favourable to the plaintiffs; and, secondly, that there should probably be an addition to it, which perhaps the Vice-Chancellor, if asked, would himself have made, namely, that it should be declared to be without prejudice to any legal or equitable question between the plaintiffs and the appellants in any other suit. It may be said that this will enable the appellants to re-open with the plaintiffs a dispute that we now decide. The particular nature, however, of a solicitor's lien, and the particular shape of the suit and case, seem to me to render this course nevertheless not unjust nor inexpedient.

The Lord Justice TURNER, after stating the facts of the case, said: The first objection which was raised to the decree on the part of the appellants was, that it has dealt with the case upon the footing of the plaintiffs having the right to pay off the 398*l.*, and to obtain the deed in question by means of such payment, a right which it was insisted could only be acquired by contract, and does not belong to a solicitor by virtue of his lien, the lien being merely dormant. This objection, however, seems to me to rest upon a false assumption. It assumes, that the case of the plaintiffs is wholly founded upon the lien, which they claim, but this, as I view the case, is not so. Upon the facts alleged and proved,

it must, I think, be considered as established, that the mortgagees agreed to hold the deed upon the terms contained in the letter of the 3d of September, 1851; in effect, that they agreed not * 297 to part with the deed without the authority of the * plaintiffs, and the plaintiffs' case seems to me to rest not upon the lien only, but upon the lien coupled with the agreement.

Assuming then, for the present, that the lien and the agreement can subsist together, the plaintiffs' case presents a wholly different aspect. There is an equity independent of the lien to restrain the mortgagees from parting with the deed, and it is abundantly clear upon the evidence, that the defendants the Walkers, the appellants before us, had notice of that equity.

The injunction prayed by the bill would, therefore, be due, but then the mortgagees, having executed the deed and thereby passed the estate to Sharp, had, as I conceive, a right to insist against the plaintiffs, that they would not continue to hold the deed without payment of the 398*l.*, the consideration for which it was executed, and to require the plaintiffs to pay them that amount, and they might do this, as I apprehend, either in Court or out of Court. The decree has, I think, proceeded upon this footing, for, although in some respects it partakes of the character of a redemption decree, in other respects it differs from such decrees. There is no foreclosure consequent upon the redemption. For these reasons I think that the objection first urged against the decree cannot be maintained.

But then it was argued, on the part of the appellants, that the agreement to which I have referred, and the lien, could not subsist together; that the fact of the plaintiffs having parted with the possession of the deed for the purpose of its being executed by the mortgagees, of itself destroyed the lien, and, further, that the character of the document, on which the lien originally attached, * 298 was altered by the execution of it by the * mortgagees, and that the lien could not attach upon the altered document.

Both these questions depend, as it seems to me, upon the character in which this deed was held by the mortgagees and their solicitors. If a solicitor, having a lien upon a document, places it in the hands of an agent or trustee, it cannot, I think, be said that his lien is defeated, nor can any change in the character of the document, as I think, destroy the lien, if the agent or trustee has agreed to hold the altered document subject to the lien. In

either case the document cannot rightfully pass into the hands of any third person. In each case the possession of the agent or trustee is the possession of the solicitor. Suppose a country solicitor to send up documents to his London agent, with directions to hold them on his account, the lien of the country solicitor must surely remain. Let it be added, that they are sent to procure their execution by a third party, and with directions to hold them on account of the third party, and on account of the country solicitor. The latter part of the direction must surely qualify the former. The third party could not take the documents out of the hands of the agent without the consent of the solicitors. In other words, the possession of the solicitor by his agent, though qualified, would remain, and with the possession there would remain the lien.

Having regard to the letter of the 3d of September, 1851, I think that in this case Messrs. North & Orred must be considered as the agents of the plaintiffs, to procure the execution of the deed by Messrs. Lyon and Ryder, and to hold it when executed on their account, and on account of the plaintiffs, and, under these circumstances, I think that the plaintiffs' lien cannot be * held to have been destroyed upon either of the grounds * 299 above suggested.

It was urged, however, on the part of the appellants, that, if the lien was not destroyed upon either of these grounds, it was at all events destroyed by the promissory note; but without reference to what was stated at the bar, that the promissory note has been dishonoured, it is a sufficient answer to this argument, that the promissory note does not cover the whole demand, and that we cannot, in this suit, try the extent of the lien.

With reference to this point it may be well to add (what is certainly not an immaterial consideration), that to have allowed the appellants to proceed for the recovery of the deed would, in truth, have been to allow them to recover it in the absence of the parties who alone were interested in contesting their right, and without the means of contesting that right.

Upon the whole, my opinion agrees with that of my learned brother, that this decree is in substance right. I agree with him also that the addition which he has suggested, as to its being without prejudice, should be made, and, subject to his concurrence, I think the addition should be extended, and that the decree should

be without prejudice to any claim on the part of the plaintiffs to add their costs of this suit, including the costs of the appeal to the lien claimed by them.

The motion before the Vice-Chancellor was much too extended, and the case too doubtful, to justify us in further altering the decree as to the costs, or in giving the costs of the appeal.

1855. April 28. May 2. Before the LORDS JUSTICES.

By a submission to arbitration between patentees, all matters in difference between the parties relating to gutta-percha were referred to the decision of the arbitrator, who was empowered to set aside certain deeds which had been executed by the parties, if he thought fit, and to order assignments to be executed for vesting in trustees all patents and applications for patents relating to gutta-percha taken out or made, or to be taken out thereafter by the parties, or any of them.

By the award the arbitrator, "if and so far as he had power and jurisdiction," set aside altogether certain deeds which he specified, but if he had not "power or jurisdiction to set the same or any or either of them aside," or to award any other matter in that his award contained, he declared that the rest of his award was yet to stand. He also by the award decided upon the rights of the parties under the deeds executed by them, and not thereby set aside, and directed that neither of the parties should grant any license of or work any of the patents save under a license from the trustees to be appointed under the award, which required the parties to nominate their respective trustees within fourteen days, and to signify their election to take licenses within two calendar months from the date of the award. The award also directed, that the parties should covenant with one another that they and their licensees should assign to the trustees any assignable interest which they might respectively have in any patents relating to gutta-percha. The submission was made a rule of a common-law Court. In a suit for a specific performance of the award: *Held*,—

1. That the award was bad for want of finality and excess of authority.
2. That, if it had not been so, a submission which would warrant such an award was not sufficiently reasonable to be enforced by way of specific performance.¹
3. That, although the defendant had to some extent acted on the award, by nominating trustees and signifying an election to take licenses, there had

¹ See Fry Spec. Perf. (2d Am. ed.) 183, §§ 254, 510, 974 *et seq.* and notes.

not been such an acquiescence in the award as to justify the Court in enforcing a specific performance of it against him on that ground, no one appearing to have been misled by his acts.

4. That many, if not all, of the principles applicable to suits for the specific performance of agreements, apply to those for the specific performance of a submission to arbitration, and that therefore the above objections were sufficient answer to such a suit.
5. That, ordinarily, this Court will not enforce specific performance of part of an agreement, nor consequently of part of an award.¹

THIS was an appeal from the dismissal by Vice-Chancellor Wood of a bill for the specific performance of an award.

The plaintiffs and the defendants Charles Hancock, Henry Bewley, and Samuel Gurney, together with a Mr. Bunn, were proprietors of a patent relating to gutta-percha.

* On the 29th of October, 1852, an indenture, being a sub- * 301 mission to arbitration, was made between Mr. Hancock of the first part, Messrs. Bewley and Gurney, described as forming together the second party to the reference, of the second part, and the plaintiffs and Mr. Bunn, described as forming together the third party to the reference, of the third part, and thereby the several parties thereto submitted to the award of W. Carpmael, Esq., all matters in difference, actions, suits, and proceedings in any way relating to gutta-percha then pending or subsisting between the parties or any of them, or the rights arising to them or any or either of them under any agreements or deeds executed by them in relation thereto, and also all matters, things, and regulations relating to or in any way concerning the future working of the inventions the subject of the patents, and the business and the manufacture and sale of gutta-percha by the parties thereto, or any or either of them. And it was thereby agreed that the arbitrator should have power (subject to the proviso hereinafter contained) by his award to decide on the rights as between each other of the parties thereto of the first, second, and third parts respectively, or any of them, under the aforesaid agreements and deeds or any or either of them, and to set aside all or any part of certain specified agreements and deeds, or any of them, and to order in any such award what should be done or omitted to be done by the parties thereto, or any of them, and should also have

¹ See Fry Spec. Perf. (2d Am. ed.) 329, § 536-548; Price v. Griffith, 1 De G., M. & G. 80.

the power of ordering such assignments and deeds to be executed as he might think fit for vesting the patents, either wholly or in part, relating to gutta-percha or any application or applications thereof then taken out by or on account of or belonging to the parties, or any or either of them, or in which they or any or either of them were interested, or which might thereafter

* 302 be taken out * by them, or any or either of them, or any one or more of such patents, in trustees, and declaring the trusts on which they should be so vested, or otherwise dealing with them, as might, in his opinion, best effectuate the object and intent of his award in relation to the matters therein referred to him. And the arbitrator was to have the power of declaring how and in what manner, and upon what terms and conditions, the patents, or any or either of them, should be worked thereafter, and to decide what articles either or all of the parties might or should not make, manufacture, or sell, and of prescribing (if the said arbitrator should so think fit) the terms on which licenses for working any of such patents might be granted to some or one or all of the parties, and by whom and at whose expense, and in what manner any infringers or infringements of the said patents, or either of them, should be prosecuted and proceedings by *scire facias* defended. The deed contained usual provisions, including a power to make the submission a rule of the Court of Common Pleas, and mutual covenants for the performance of the award, and also the following proviso: "Provided always, that nothing herein contained shall authorize or empower the said arbitrator to interfere with, inquire into, or adjudicate upon any agreement, deed, arrangement, matter, or thing whatsoever as between the several persons composing the parties hereto of the second part, or as between the several persons composing the parties hereto of the third part: provided also, that nothing herein contained shall in any wise authorize or empower the said arbitrator to direct, make, or order any award, arrangement, act, or deed which shall or may create or involve any partnership or joint liability between the said parties, or any or either of them."

* 303 * On the 12th March, 1853, the submission was made a rule of the Court of Common Pleas.

On the 28th of April, 1853, Mr. Carpmael made his award, which, after awarding the payment of costs, was, as far as is material, as follows: —

"Secondly, I award and determine that the said Henry Bewley and Samuel Gurney, the second party to the said indenture, do within one calendar month from the date of this my award pay to the said C. Hancock, the first party to the said indenture, the sum of 1245*l.* 11*s.* 10*d.* sterling."

"Fourthly, I award and determine that a certain memorandum or deed of agreement, bearing date the 2d of October, 1846, and made or expressed to be made between the said Henry Bewley and Charles Hancock of the one part, and Charles Keen (since deceased), and the said Christopher Nickels of the other part, and also a certain indenture bearing date the said 2d October, 1846, and made or expressed to be made between the said H. Bewley of the one part, and the said C. Hancock of the other part, and also a certain other indenture, bearing date the 9th May, 1850, and made or expressed to be made between the said H. Bewley of the first part, the said C. Nickels of the second part, the said W. H. Ashurst of the third part, and one B. Nickels of the fourth part, shall, if and so far as the same respectively are in force, and if and so far as I have power and jurisdiction to set the same aside, be set aside altogether, and in every part thereof, and I hereby set the same aside accordingly; and if I have not power or jurisdiction to set the same or any or either of them aside, or to award any other matter in this my award contained, I declare that the rest of my award is yet to stand."

* "Fifthly, I award and determine that the parties to the * 304 said recited indenture of submission of the first, second, and third parts shall by deed-poll release all persons from the said memorandum or deed of agreement bearing date the 2d day of October, 1846, and from all claims and demands thereunder, and from all future observance and performance thereof, and that the parties to the said indenture of submission of the first and second parts shall by deed-poll release all persons from the said indenture bearing date the said 2d day of October, 1846, and from all claims and demands thereunder, and from all future observance and performance thereof, and that the said parties to the said indenture of submission of the second and third parts shall by deed-poll release all persons except the said B. Nickels, his executors and administrators, from the said indenture of the 9th May, 1850, and from all claims and demands thereunder, and from all future observance and performance thereof."

"Sixthly, I do by this my award, decide that the rights, as between each other, of the parties to the said recited indenture under the agreements and deeds executed by them and not hereby set aside, are as hereinafter stated in this sixth clause of this my award ; and I do award, determine, and declare, that the said C. Hancock, the first party to the said recited indenture, is and shall be, as between himself and the other parties, entitled to one equal fourth part or share ; and that the said H. Bewley and S. Gurney, the second party to the said recited indenture, are and shall be, as between themselves and the other parties, entitled to one other fourth part or share ; and that the said C. Nickels, T. Wheeler, T. Lahee, T. J. L. Sowter, L. St. L. Bunn, and W. H. Ashurst, the third party to the said recited indenture, are and shall be, as

between themselves and the other parties, entitled to the
 * 305 remaining two equal fourth * parts or shares of or in the several patents enumerated in the schedule hereto, and of and in all other patents, either wholly or in part relating to gutta-percha or any application or applications thereof, already taken out by or on account of or belonging to the said parties of the first, second, and third parts to the said recited indenture, or any or either of them, or (to the extent of their interest) in which they, or any or either of them, are or is interested, or which may hereafter, during the subsistence of any of the said scheduled patents or any prolongation of any of such patents, be taken out by them, or any or either of them ; and I award and determine that a deed of mutual covenants shall be made between and executed by the same parties as are parties to the said indenture of submission of the first, second, and third parts, in and by which deed each of the said parties shall covenant for himself and themselves, but not for either of the other parties, that every patent, wholly or in part relating to gutta-percha or to any application or applications thereof, in which the covenanting party, or any individual member or members of such party, or any person hereafter becoming interested under any of the said scheduled patents as owner or part owner for the time being of the license which may be taken by such covenanting party under this my award as hereinafter mentioned and provided, is already interested, or shall, during the subsistence of any of the said scheduled patents or any prolongation of any of such scheduled patents, become interested, shall, to the full extent of the assignable interest therein of such

party or member or members or owner or part owner as aforesaid, be assigned to and vested in the persons or person who shall be the trustees or trustee for the time being under the trust to be constituted as hereinafter mentioned, upon the same or the like trusts, and subject to the same or the like rights and * claims, as those herein mentioned and prescribed with * 306 reference to the said scheduled patents.

“Seventhly, I award and determine that each of the said three parties to the said recited indenture shall within fourteen days from the date of this my award, by writing under his or their hand or hands, nominate a person who shall not be any one of the persons named in the said recited indenture to be trustee on behalf of the nominating party for the purposes hereinafter mentioned; and I award and determine that every such nomination shall within the said fourteen days be communicated in writing by the nominating party to the other parties.

“Eighthly, I award and determine that if any or either of the said three parties to the said recited indenture shall not so make or shall not so communicate such nomination as aforesaid within the time aforesaid, then the trustees or trustee nominated by the other parties or party shall be the trustees or trustee for the purposes hereinafter mentioned.

“Ninthly, I award and determine that the trusteeship constituted as aforesaid shall, by a deed which shall be executed for the purpose by the three parties to the said recited indenture, be made subject to a power in favour of each nominating party to appoint from time to time a new trustee in the place of a trustee first nominated by such party, or of the successor for the time being of such trustee in the event of the death, resignation, insanity, incompetency, or foreign residence of such first nominated trustee, or of any successor of such trustee.

“Tenthly, I award and determine that the three parties to the said recited indenture shall with all convenient * expedition cause or procure all the said patents and * 307 patent rights hereinbefore mentioned or referred to to be from time to time effectually invested in the said trustees or trustee for the time being, upon the trusts hereinafter mentioned.

“Eleventhly, I award and determine that all the said patents and patent rights hereinbefore mentioned or referred to shall be held by the said trustees or trustee thereof for the time being;

and that in the mean time, and until vested in such trustees or trustee, the same shall be held by the respective legal proprietors thereof, upon trust for giving effect to the purposes and directions hereinafter mentioned and contained relative to the working of the said patents and patent rights.

"Twelfthly, I award and determine that the said three parties to the said recited indenture shall be precluded from ever in any way disputing, and that none of them shall dispute, the validity of any of the said patents; and that neither of the said parties shall have any right or power of granting, nor shall grant, any license whatsoever under any of such patents or patent rights; and that neither of the said parties shall have any right or power of working, nor shall work, any of such patents or patent rights, save under a license taken in manner and upon the terms hereinafter mentioned.

"Thirteenthly, I award and determine that each of the said three parties to the said recited indenture shall be entitled to take a license to work all the said patents and patent rights upon the terms hereinafter mentioned, upon signifying his or their election to take the same by writing delivered to the trustees or trustee, or, if there be none, to the other parties, within two calendar months from the date of this my award, but not afterwards.

* 308 * "Fourteenthly, I award and determine that every such license shall entitle the licensee or licensees to make, manufacture, and sell all articles comprehended by or within the patents or any of them, and shall be granted by the trustees or trustee or other proper parties or party for the whole duration of the respective patents, and every or any extension thereof, subject to the provisions hereinafter mentioned, and subject to a power in favour of the respective licensees to surrender their licenses after a three calendar months' notice to that effect to the trustees or trustee or other the grantors or grantor of the respective licenses.

"Fifteenthly, I award and determine that such respective licenses shall only be enjoyed in their entirety and shall not be severable, but that in their respective entirety and without severance the same shall be transmissible and assignable to the survivors and survivor, executors, administrators, and assigns, of the respective licensees.

"Sixteenthly, I award and determine that the licensees shall be bound by their licenses to pay to the trustees or trustee, if there

be any trustees or trustee for the time being, a royalty at the rate of one per centum, calculated as hereinafter mentioned, upon the amounts of all sales, as hereinafter defined or explained, effected subsequently to the end of the year 1852.

"Seventeenthly, I award and determine that the trustees or trustee for the time being shall stand possessed of such percentages upon trust to pay thereout all expenses attendant upon the releases, assignments, and licenses and other deeds hereby prescribed and all expenses attendant upon any actions, suits, or other proceedings which the trustees or trustee may think fit to * bring or defend in relation to the premises, and all * 309 other expenses incident to the said trusts, or to the said patent property, except such expenses as are hereby charged upon the parties, or any of them, and that the trustees and trustee for the time being may, at their or his discretion, divide between the parties in proportion to their interests in the patents as before defined, any excess of the said fund of percentages beyond the amount which the trustees or trustee shall, for the time being, think it expedient to keep at the disposal of the trustees, and that in the event of any deficiency of the said fund for the purposes aforesaid, whether arising in consequence of any such division or not, the deficiency shall from time to time, immediately on the request of the trustees or trustee, be made good by the parties in proportion to their said interests in the patents.

"Nineteenthly, I award and determine that the licenses shall be so framed as to provide that if licenses shall not be taken as aforesaid by all three parties, or if any license which shall have been so taken by any party shall be surrendered as aforesaid, then from and after the expiration of the said two calendar months, or from and after the surrender of any license, as the case may be, a further royalty, in addition to the said one per centum, shall be and be made payable upon the amounts of sales, as hereinafter defined and explained, by such of the three parties as shall have and retain a license or licenses, and during the retention thereof, to such of the three parties as shall not have had a license or licenses, or as shall have surrendered the same.

"Twentiethly, I award and determine, that it shall be further provided by the licenses, that the rate of the last mentioned royalty shall be fixed upon the supposition that six per centum

* 310 upon sales, in addition to the said *one per centum, shall be the rate at which the patents may be worked, and that each party liable to pay such last-mentioned royalty shall deduct and retain a share of such six per centum proportionate to the share of such party in the patents as before defined, and shall pay to each party entitled to receive the royalty a share of such six per centum proportionate to the share of each receiving party in the patents as before defined, so that if the first party were liable to pay, and the second and third parties were entitled to receive the said royalty, the first party would pay one and a half per centum to the second party, and three per centum to the third party, and so in other cases.

"Twenty-firstly, I award and determine that it shall be further provided by the licenses, that the said royalty of one per centum and the said additional royalty shall be made payable at the end of every half-year ending on the 30th of June and the 31st of December during the continuance of the respective licenses, and at the end of any fractional part of half a year immediately preceding the expiration or determination of the licenses respectively, and that the first half-yearly period shall expire on the 30th day of June, 1853; and that, subject as hereinafter mentioned, the said royalty of one per centum and the said additional royalty shall be calculated upon the amounts of money for which articles containing gutta-percha shall be sold by the respective licensees during each half-yearly or fractional period, the calculation being made upon the gross amounts of sales, without any deductions for bad debts, expenses, or otherwise; and that, in respect of sales effected before the 12th day of March, 1859, the royalties payable shall be calculated upon all articles containing gutta-percha, without reference to the mode of their manufacture; and that, in respect of sales effected on or after the said 12th day of

* 311 March, * 1859, the royalties payable shall be calculated only upon such articles containing gutta-percha as shall have been manufactured under some one or more of the said patents hereinbefore mentioned or referred to and then remaining unexpired; but that, both before, on, and after the said 12th day of March, 1859, as regards telegraph wires, and also as regards other articles containing gutta-percha, and also containing some other ingredient or ingredients costing more for a like weight than gutta-

percha, the royalties shall be calculated upon the selling prices of the manufactured articles, less the cost of the wire or other ingredient or ingredients costing more for a like weight than gutta-percha."

By an indenture dated the 30th of June, 1853, Mr. Bunn, for the considerations therein mentioned, assigned his interest in the patents to the plaintiff, Christopher Nickels.

In pursuance of the award the defendants paid the costs thereby directed to be paid within fourteen days after the date of the award, and nominated trustees on their behalf.

In further pursuance of the award, the defendants Hancock, Bewley, and Gurney, within two calendar months from the date thereof, respectively made and delivered to the trustees their election in writing to take licenses to work the patents and patent rights in the award mentioned upon the terms therein contained.

The terms in which the defendant Hancock signified his election to take the license were the following: "I, the undersigned Charles Hancock, of No. 48, Milner Square, Islington, in the county of Middlesex, gutta-percha manufacturer, in pursuance of the thirteenth * article of the award, bearing date * 312 the 28th day of April, 1853, and under the hand and seal of William Carpmael, of No. 4, Old Square, Lincoln's Inn, in the county of Middlesex, Esquire, and made in the matter of an arbitration between me, the undersigned Charles Hancock, and Henry Bewley and Samuel Gurney and Christopher Nickels, Thomas Wheeler, Thomas Lahee, Thomas John Leavens Sowter, Lockington Saint Lawrence Bunn, and William Henry Ashurst, do by this writing under my hand signify my election to take a license to work all the patents and patent-rights mentioned or referred to in the said award, upon the terms therein mentioned. Dated the 27th day of June, 1853. CHARLES HANCOCK. To William Tyler, James Sheppard, and Samuel Lahee, the trustees nominated under the said award, or whomsoever else it may concern."

Drafts were prepared on behalf of the plaintiffs for carrying into effect the award, and were sent to the defendants' solicitors, but differences arose as to the provisions of them.

On the 25th of March, 1854, the defendant Hancock wrote and sent to the defendant Bewley the following letter: "I have recently taken opinions upon the award made by Mr. Carpmael, and am

fully advised that it is absolutely void, and that all parties are in exactly the same position as if there had been no reference. I therefore give you notice that it is not my intention to carry out the award. Nevertheless, under the circumstances, if you have any proposition to make for working my patents, which shall also secure to all parties a mutual interest in that portion of the property which belongs to the common stock, it shall have my most mature consideration. As it is important I should hear from you at once, an early reply will oblige."

* 313 * On the same day the defendants' solicitors returned one of the drafts unapproved, accompanied with a letter, the material part of which was as follows: "It is true that we have had this draft before us for some time, and the reason for the delay in returning it is, that Mr. Hancock has been endeavouring to induce Messrs. Bewley & Gurney to come to some arrangement more consistent with the rights and interests of all parties than that suggested by the award, which has not been acquiesced in, and he has requested them to make him counter propositions, which they have not done, both with an anxious desire to put the future workings of the factories upon a firm and conciliatory basis. Having failed in this, we are now instructed to return you the draft unapproved; and we may add, that Mr. Hancock being advised that the award cannot be enforced, he will not be a party to any deed which does not secure to him his rights in the patents."

The bill in the present suit was thereupon filed, praying that the award might be specifically performed, and that the defendants might be ordered to execute such releases as mentioned in the award, and for accounts, and for the appointment of a receiver and manager.

The Solicitor-General, Mr. Willcock, and Mr. C. T. Simpson, for the plaintiffs. — They referred to *Webb v. Ingram*, (a) *Nicholls v. Jones*, (b) *Russell on Arbitration*, (c) *Phillips v. Evans*, (d) *Winter v. Lethbridge*, (e) *Wood v. Griffith*. (g)

* 314 * *Mr. W. M. James, Mr. Webster, and Mr. Giffard, for*

(a) Cro. Jac. 663.

(b) 6 Exch. 373.

(c) Page 318, and the cases there collected.

(d) 12 M. & W. 309.

(g) 1 Swanst. 43.

(e) 13 Price, 533.

the defendant Hancock. — They referred to *Wood v. Griffith*, (a) *Pope v. Brett*, (b) *Hunt v. Hunt*, (c) and *Pedley v. Goddard*. (d)

The arguments appear sufficiently from the judgments.

THE LORD JUSTICE KNIGHT BRUCE. — The award which has been the main subject in discussion upon this appeal is the award of an able, experienced, and very well-intentioned arbitrator, — an award made by him, it is probable, with the assistance of good legal advice. Of course, however, we must not allow ourselves to be unduly swayed by any such considerations. The award, as I understand the matter, has not been made a rule or order of the Court of Chancery.

A bill — the bill now before us — has been filed for the purpose of obtaining specific performance of the award, in the exercise by this Court, not of any jurisdiction peculiar to awards, but of its ordinary jurisdiction applicable to agreements. Many therefore, if not all, of the principles applicable to ordinary cases or suits for the specific performance of agreements must apply to the present case. As I have already intimated, perhaps not all.

The award has received our best attention both in Court and out of Court, and the result of my examination of it, and my consideration of the able arguments * that have been * 315 urged upon the subject on each side, is, that I am not satisfied that the award is not materially uncertain. I am not satisfied that the award is not materially otherwise than final. I am not satisfied that the award is not materially, inextricably, and incurably excessive.

Upon not one of those three points, however, do I consider it necessary to give a decisive opinion.

Let it be assumed that the award is certain. Let it be assumed that the award is final. Let it be assumed that the award is not excessive. Still, I must say, looking at the subject-matter and the nature of the award, that, if it is not excessive, the agreement in the shape of a submission to reference, which rendered it possible to make such an award without going beyond the functions of the arbitrator, was an agreement so much less than wise, so much

(a) 1 Swanst. 43.

(c) 5 Dowl. 442.

(b) 2 Saund. 292.

(d) 7 T. R. 73.

more than imprudent, that it does not belong to this jurisdiction to act upon a contract of that description for the purpose of specific performance. In saying this I allude particularly and pointedly, if not exclusively, to the 6th and 12th, the 15th, 17th, and 20th clauses of the award, and the schedule to the award. I apprehend that to enforce an agreement containing provisions of that nature (which for no purpose and in no sense material to the present suit can be rejected) would involve so much inconvenience, so much hardship and such various mischief, that it appears to me absolutely impossible to act here upon the agreement against the defendant Mr. Hancock, who objects to it.

The Court of Common Pleas may consider the award valid and may act upon it. It is competent or, at least after our decision in this case, will be competent, to the plaintiffs to apply to the

* 316 Court of Common Pleas directly * upon the award being a rule or order of that Court. It will be competent also to the plaintiffs to bring an action upon the award if they think that they can sustain it against any legal defence. With no part of these powers or rights on the part of the plaintiffs is it our wish or intention, or within our power, if we were disposed, to interfere. What we are asked to do is, in a suit for specific performance open, as I have already said, if not to all, to almost all the considerations that belong to specific performance, to enforce directly an agreement such as this is. For the reasons I have already stated, I think that impracticable.

It has been suggested, and very well argued, that Mr. Hancock's conduct precludes him from any such defence; that he has acquiesced in the award; that he has led the plaintiffs to believe that he would not object to the award; that they have regulated their conduct upon those views of his in such a manner that he has barred himself from all objections to the specific performance.

These arguments might possibly have had more weight if Mr. Hancock had been a plaintiff seeking to be relieved against the award. He is here, however, only a defendant resisting specific performance. Still, however, if the case had been established to my satisfaction, in the way in which the Solicitor-General has so well put it in argument, I might not impossibly have held Mr. Hancock precluded from his defence. But that is not my view of the evidence.

It must be remembered that (under whatsoever circumstances)

he declined to receive the money which was to be paid to him within a month after the award, which month expired in the month of May following the award; and it must be remembered also that during a * considerable period the * 317 plaintiffs themselves objected to the award and complained of it.

Upon the question of the misleading of the plaintiffs or of damage to the plaintiffs occasioned by Mr. Hancock's conduct, his affidavits and the evidence on his part must of course be looked at as well as the evidence on the part of the plaintiffs. And it certainly is not stating my view of Mr. Hancock's case in that respect too highly, when I say that the evidence taken together has not satisfied me that the plaintiffs were misled; has not satisfied me that any damage has been sustained by the plaintiffs in consequence of any conduct on the part of Mr. Hancock; has not satisfied me that he has acted in such a manner as to preclude him from the ordinary rights belonging to a defendant, who, upon the ground of the nature of the award, is resisting a suit for the specific performance of that award.

I think that the Vice-Chancellor was correct, in which observation I mean to include, of course, his mode of dealing with the costs. The question as to costs here, however, stands very differently, and I am of opinion that this appeal must be dismissed with costs.

THE LORD JUSTICE TURNER.—The object of this bill is to enforce an award made upon a submission, involving matters of very great intricacy and complication.

That award has been made by a gentleman of great experience and talent and of most undoubted integrity, and the Court, therefore, must feel every disposition to support the award. But before proceeding to do so, * we are of course bound to * 318 look at the jurisdiction under which we are called upon to act. That jurisdiction is the jurisdiction of this Court to enforce the specific performance of agreements. When parties have agreed to submit their differences to the determination of a third person, and to abide by any orders or regulations which he may make, his decision, and the regulations and orders which he may prescribe, constitute the agreement of the parties, and it is for the

purpose of enforcing that agreement this Court interferes to enforce and give effect to the award.

In considering, therefore, the question, whether the Court ought in any particular case to interfere for the purpose of enforcing an award, the first point to be looked at is, what have the parties agreed to submit to the arbitrator? For if it shall appear that the arbitrator has exceeded the authority which has been given to him by the submission, the parties have never agreed to be bound by his decision to that extent, and there is, therefore, to that extent, no agreement between the parties which the Court can be called upon to enforce.

So, again, if the arbitrator has not finally decided all the matters which, by the submission, he was called upon to decide, the parties have agreed to be bound by his judgment and decision upon the entire matter, and not upon part of the matter submitted to his consideration. In such a case, therefore, there is equally a defect of agreement on the part of the parties, as there is in the case where the arbitrator has exceeded his authority. So, again, if the provisions of the award be such as cannot be carried into effect consistently with the submission into which the parties have entered, the case resolves itself into this posi-

* 319 tion, that the parties, through the * medium of the decision of the arbitrator, have come to an agreement which cannot be worked out by the Court, and the Court, therefore, in the ordinary exercise of its jurisdiction, cannot enforce such an agreement.

These are the principles which, in my opinion, must guide us in determining the question, whether the award in this case ought to be enforced or not.

Now, in the first place, after having given much attention, both in Court and out of Court, to this submission and to this award, I am satisfied that the arbitrator has exceeded the authority which was given to him. By the reference, he is to decide "all matters in difference relating to gutta-percha now pending or subsisting between the parties or any of them, or the rights arising to them, or any or either of them, under any agreements or deeds executed by them in relation thereto, and also all matters, things, and regulations relating to or in any way concerning the future working of the inventions, the subjects of the patents, and the

businesses and the manufacture and sale of gutta-percha by the said parties hereto, or any or either of them ;” and power is given to him by the deed of submission, to order such assignments and deeds to be executed as he may think fit, for vesting “all and singular the patents, either wholly or in part, relating to gutta-percha, or any application or applications thereof, now taken out by or on account of or belonging to the said parties hereto, or any or either of them, or in which they, or any or either of them, are interested, or which may hereafter be taken out by them, or any or either of them, or any one or more of such patents, in trustees, and declaring the trusts on which they shall be so vested.”

* Now the sixth clause of the award, in the first place, * 320 decides what are the rights of the parties under the agreements and deeds which have been executed by them, “and not hereby set aside,” words upon which I shall have occasion to make an observation with reference to another part of the case. Then the arbitrator decides what the rights of the parties are, that they are vested as to a moiety in a third party. Then he proceeds thus: [His Lordship read the latter part of clause six, as to the execution of a deed of mutual covenant, set out *ante*, p. 305.]

That clause, therefore provides by covenant of the parties, that this award shall reach, not merely to the patents in which these parties are interested at the time, but to every patent in which any one of these parties may at any future time acquire an interest, and not only to patents in which any one of these parties may at any future time acquire an interest, but even to patents in which an alienee of a licensee under the award may become interested, because the provisions of the award go to this extent, that the parties are not to deal with any of the patents in which they have or may have an interest, otherwise than through the medium of a license granted to them by trustees in whom the patents are vested. That license when granted becomes assignable by the party to whom the license is granted, and when the license has been assigned, the assignee of that license becomes a party interested within the meaning of the sixth clause, so that every patent which may be taken out by the assignee of the license in any manner relating to gutta-percha must be assigned to the trustees upon the trusts declared in this award.

But what are the terms of the submission? They
 * 321 * authorize the arbitrator to decide upon the rights of the parties in the existing patents, and to deal with future patents, but only with patents taken out by the parties, or any or either of them, or in which they, or any or either of them, may be interested. It seems to me, therefore, that there has been a clear excess of authority on the part of the arbitrator, and to that extent, therefore, there is no agreement between the parties.

I also think, that this award is open to legal impeachment, upon the ground that it is not final. I have had considerable difficulty upon the fourth clause of the award. By that clause the arbitrator deals with three deeds which have been entered into between these parties; a deed of agreement of 2d October, 1846, another deed of that date, and a deed of 9th of May, 1850. He says, by his award, "if and so far as the same respectively are in force, and if and so far as I have power and jurisdiction to set the same aside, they shall be set aside altogether and in every part thereof, and I hereby set the same aside accordingly; and if I have not power or jurisdiction to set the same, or any or either of them, aside, or to award any other matter in this my award contained, I declare that the rest of my award is yet to stand." In that passage, therefore, he leaves it altogether in doubt whether he has or has not power to set aside these deeds. That is a question on which he comes to no conclusion. He says, "I set them aside if I have power to set them aside, and if I have no power, my award is yet to stand as to the rest of the matter." What is then the award as to the rest of the matter? According to the terms of the submission, he is to decide all the rights of the parties. They submit to his award, order, arbitrament, and final end and determination all matters in difference, actions, suits, and pro-
 * 322 ceedings in * any way relating to gutta-percha now pending or subsisting between them, or any of them, or the rights arising to them, or any or either of them, under any agreements or deeds executed by them in relation to those patents. But when we come to the decision, the decision is: "I do by this my award decide that the rights as between each other of the parties to the recited indenture, under the agreements and deeds executed by them, and not hereby set aside, shall be as follows."

Now if those agreements are not set aside by the award, and if

he had no power by the award to set them aside, what is his decision upon the subject? In truth, the matter is left wholly undecided. If he meant to have finally decided the question, he must have arrived at a conclusion, and given a definite opinion upon the question, whether he had or had not power to set aside the deeds. These words, "not hereby set aside," contained in the sixth clause of the award, seem to me to render the award open to the objection, that it is not final as to these matters.

I had hoped, and rather thought for some time, that the defect had been cured by the fifth clause, because by that clause provisions are made for releases being executed by the parties in respect of rights which might be claimed under these several instruments. But, unfortunately, there is a miscarriage there also, for it appears by the fifth clause, that all parties are to be released except Benjamin Nickels, his executors, administrators, and assigns. It seems to me, therefore, that under the sixth clause, coupled with the fourth, the award is not final.

But then, again, according to the submission, the arbitrator was to decide "all matters, things, and regulations * re- * 323 relating to or in any way concerning the future working of the inventions, the subject of the said patents, and the businesses and the manufacture and sale of gutta-percha by the said parties hereto, or any or either of them." It is clear, therefore, that the submission proceeded upon the footing, and that the intention of the parties to the submission was, that there should be a future working of these patents. Now, how has the arbitrator dealt with that? He has prescribed that all the parties shall assign the patents present, as well as future, to trustees, and that no person shall work those patents except under licenses granted by the trustees. He has expressly prescribed by the fourth and the twelfth clause, that neither of the parties shall have any right or power of working, or shall work, any of the patents or patent rights, save under a license taken in manner and upon the terms hereinafter mentioned.

We turn then to the next clause, which provides what those licenses are to be, and it is, "that each of the said three parties to the said recited indenture shall be entitled to take a license to work all the said patents and patent rights upon the terms hereinafter mentioned upon signifying his or their election to take the same by writing delivered to the trustees, or, if there be none, to

the other parties, within two calendar months from the date of this my award, but not afterwards." Now, suppose that no party under this award had delivered the requisition and election to the trustees to work the patents or to take the license, the immediate result would have been that, under the provisions of the award, none of the parties could themselves work the patents, for the twelfth clause is imperative that no one shall work them except under the license. And this is done in a case where the

* 324 plain object and intent of the * submission of the parties is that the patents shall be worked.

The case does not even stop there, because any of these parties may surrender the licenses which have been granted, and if licenses therefore be granted to one or other of the parties, and a surrender of these licenses be made, the effect of it is, that there being no one licensed to work the patents, the patents cannot from the time of that surrender be worked at all.

The Solicitor-General in his very able argument attempted to answer that objection upon the ground, that the rights of the parties were declared by the award, and that they must proceed according to those rights; but, looking to the terms of the submission, the clear intent of the parties was, that the patents should be worked under regulations, and if the award, therefore, has placed the patents in such a position that they cannot be worked, it has clearly gone beyond the intention of the parties expressed in the submission, and cannot be considered final and conclusive upon the subject of the working.

A good deal has been said in the course of the argument as to the reasonableness or unreasonableness of the award. Upon that I think it right to say one or two words, because it has been the subject of observation with reference to the case of *Wood v. Griffiths*.

According to the provisions of this award, any party taking out a license may work all the patents, though those patents may relate not only to gutta-percha, but partly to gutta-percha and partly to other matters. But how is the royalty which is to be

* 325 paid upon the working * of the patents provided for? Why the royalty is to be paid upon the working of gutta-percha, and therefore if any one thinks proper to take the license, he may work one of these patents for all the purposes to which the patents are applicable, and if he does not apply them to gutta-percha he is

liable to pay no royalty whatever. In that case, too, the whole right and interest of all the parties to this agreement, who have not taken licenses, would be utterly and entirely destroyed. I do not understand Lord ELDON's observations as to the course which the Court will take in judging of the reasonableness of the award, or allowing the consideration of that question to enter into the question of specific performance of the award to go to that extent.

If it be a fair subject of discussion and consideration whether one course or another course be the right one to be taken by parties who have submitted their differences to arbitration, and have said that they will abide by the decision of the arbitrator, I might agree that the judgment of the arbitrator upon that question must decide the point. But here the judgment of the arbitrator goes to the length of destroying the right of one of the parties to the agreement, though the parties never authorized Mr. Carpmael to decide that any one of them had no right, and should acquire no interest in the subject in dispute, but only agreed that he should determine the mode in which their rights and interests should be regulated.

It seems to me, therefore, that, if it was necessary to decide this question upon the point of unreasonableness, that point alone would be sufficient to decide it. I think it unnecessary, however, to decide the case upon that point, there being here a want of finality, excess * of authority, and an impossibility of * 326 working out the award according to the rights and interests of the parties.

It is said that there has been acquiescence here, and such acquiescence on the part of Mr. Hancock as will entitle the plaintiffs to enforce the agreement against him, and the case has been stated as strongly as it could be with respect to the amount of expenditure on the part of the plaintiffs and on the part of Bewley and Gurney, made, as it is said, upon the ground of Mr. Hancock's acquiescence. It is endeavoured, therefore, to bring this case within the principle of those cases in which the Court will direct a specific performance on the ground of the party having lain by. Looking at those authorities, I am quite satisfied that there has been no such acquiescence on the part of Mr. Hancock, no such encouragement to the other parties, as would justify the Court in enforcing the agreement against him upon that ground. He re-

fused at a very early stage of the business to receive 1200*l.*, which, according to the third clause of the award, was to be paid to him. It appears that there have been repeated discussions upon the subject of this award. Some portions of the statements made by Mr. Hancock, with reference to what passed between himself and others, are not satisfactorily met by the affidavits on the other side, and the true result of this part of the case seems to me to be, that the plaintiffs have acted a little more hastily than they need have done; but I think that the fact of their having so acted cannot entitle them to enforce the award against Mr. Hancock upon the ground of acquiescence. I think so the more because if these plaintiffs have sustained injury by the course of proceeding taken on their part, and if they were led into that misfortune by the conduct of Mr. Hancock, * the law affords them an ample remedy for any injury which they have suffered in that respect.

There is only one other point upon which I have to make an observation; viz., the argument brought forward by the Solicitor-General, that we should separate from this award those parts which go beyond the authority, or which cannot be dealt with, and enforce the performance of the remainder. I do not think, looking at this award, that it is possible to do so; nor do I feel at all satisfied that this Court would enforce the performance of part of an award if it appears that it cannot be enforced wholly. I think that this Court, in its ordinary exercise of this jurisdiction, does not enforce parts of agreements. It is exactly one of the cases which this Court ordinarily leaves to a Court of Law, as being better able to do justice between the parties than this Court can do.

I quite concur in the opinion of my learned brother that this appeal must be dismissed with costs.

* TAYLOR v. PORTINGTON.

* 328

1855. June 25. Before the LORDS JUSTICES.

An agreement to take a lease of a house if put into thorough repair, and the drawing-rooms "handsomely decorated according to the present style:"
Held, too uncertain for the Court to enforce.¹

THIS was an appeal from a decree of the Master of the Rolls, directing the specific performance of an agreement for a lease.

On the 16th of April, 1854, the plaintiff wrote to the defendant's son-in-law, who had authority to act for her in the matter, the following letter: "Sir,— Mr. Booth has sent me your note relative to the house in Abbey Place. I took the lease for twenty-one years in 1844, determinable at the expiration of the first seven or fourteen years, and the fourteen years will not expire till 1858. I have no objection to let the house at an annual rent, or assign the lease, whichever is approved of by the tenant. I believe the house to be in a most perfect state of repair; if not, I will put it into thorough repair."

The defendant's son-in-law replied as follows: "Sir,— In reply to your note of the 16th instant, I beg to say that Mrs. Portington, my mother-in-law, and for whom I am acting as we all live together, will be willing to take the house in Abbey Place on an agreement for three years from Midsummer next at the rent asked, 85*l.*, if put into thorough repair, and would like to have the option to remain afterwards as a yearly tenant. We took the house we now occupy on the same agreement, and have been eleven years in it. Her object in taking a house for that term being, not that she should have to quit at the expiration, but simply that she may, in case of death, not leave her family encumbered. She formerly occupied a house in Hamilton Terrace on a like agreement,
 * and was in it fourteen and a half years. Of the sub- * 329
 stantial repairs I am not capable of speaking, but the rain
 seems to have penetrated the roof, and the upper ceilings are not

¹ See *Sugden V. & P.* (14th Eng. ed.) 213, 214; *Brace v. Wehnert*, 25 Beav. 348; *Parker v. Taswell*, 27 L. J. N. S. 812; 2 De G. & J. 559, 572; *Cooper v. Hood*, 26 Beav. 293; 2 Dan. Ch. Pr. (4th Am. ed.) 1659, 1660, and note (1); *Oxford v. Provand*, L. R. 2 Cas. in Priv. Council, 135.

only stained but cracked, and the portico of the gate and the iron railing are much out of order. Of the ornamental I am really almost afraid to speak, for Mrs. Parry and I have just been over the house again and find that the walls are not only broken in many places, but that they must be repapered throughout the house. The drawing-rooms we should require to be handsomely decorated according to the present style. Paint is required both inside and outside, although perhaps for some parts one coat might be sufficient. We did not look at the basement to-day, but I remember that it required to be cleaned throughout. I fear you may think me exigent, but really think it better to be as candid as possible on the matter, and for that reason I have endeavoured to enter thus minutely into all the circumstances, and with every apology, begging for an early reply, and am, Sir, yours very truly, L. J. PARRY."

The plaintiff replied as follows: "19th April, 1854. Sir,—I reply to your letter of the 18th. I will agree to the terms you mention as to the house No. 14, Abbey Place, and I have requested a gentleman, a friend of mine, a surveyor, to have the necessary repairs, &c., required by you completed. Perhaps you would like to meet him at the house; and if so, as he resides at St. John's Wood, I have no doubt he would do so."

Disputes having arisen as to the repairs the defendant refused to take the lease, and the present suit was instituted. The Master of the Rolls decided that the two letters constituted a valid agreement, and decreed the execution of a lease for three years if a good title to grant such lease could be shown, the rent to
 * 330 be reserved by * such lease to commence and be payable from the time when the said house and premises shall be thoroughly repaired and decorated as provided by the said agreement, any question as to the said repairs and decorations to be settled by the Judge in case of difference between the parties.

The defendant appealed from the whole decree.

Mr. Roundell Palmer and *Mr. Nugent*, for the plaintiff.

Mr. Campbell and *Mr. Regnier W. Moore*, for the defendant.

THE LORD JUSTICE KNIGHT BRUCE. — It appears to me that the expressions, "if put into thorough repair," and "the drawing-

rooms we should require to be handsomely decorated according to the present style ; paint is required both inside and outside, although perhaps for some parts one coat might be sufficient," have imported uncertainty into what might otherwise have amounted to an agreement sufficiently definite for the Court to enforce. That uncertainty has not been removed, and I think that the bill should have been dismissed ; but as the defendant's conduct appears to have been rather unreasonable the bill will be dismissed without costs.

The Lord Justice TURNER concurred.

* HOPE v. LIDDELL.

* 331

1855. June 26, 30. Before the LORDS JUSTICES.

A deed containing a recital alleged to be material to the case of defendants in a suit was in the custody of the solicitor of some of the parties to the deed, and he claimed a lien on it in respect of the costs of its preparation. On his being called as a witness by the defendants, who were not his clients or parties to the deed, to produce it: *Held*, that he could not refuse to do so by reason of his lien.¹

THIS was the appeal of Mr. Clipperton, a witness in the cause, against an order of the Master of the Rolls, directing him at his own expense to produce before the examiner an indenture dated the 6th of March, 1830, and made between the parties specified in the order.

The suit in which the appellant was called as a witness was one instituted by *cestuis que trustent* to set aside a sale by trustees. The defendants, on whose behalf the witness was called, alleged that the deed in question (which was mentioned in the answer of those defendants) was one of a series of deeds executed by the *cestuis que trustent*, tending to show that they had sanctioned and adopted the sale which it was the object of the suit to impeach.

A cross bill had been filed by the defendants, and amongst the

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 909, 943, 1827, 1842.

documents mentioned in the answer of one of the defendants to that suit, who was one of the plaintiffs in the present suit, was a copy of the deed in question.

The witness, on his examination on the 23d April, 1855, stated as follows :—

“I was formerly in practice as a solicitor, but do not now take out any certificate. I practised as such in 1830, and down to 1849. I transacted business for Benjamin Norton in 1830. I only know the plaintiff Octavius Greene by name. I prepared a deed in 1830 for Benjamin Norton.

* 332 * “ Q. Is the deed prepared by you in the year 1830 the deed mentioned in your *subpœna duces tecum* ?

“ A. I decline to answer the question, because I have a lien on the deed prepared by me for Benjamin Norton in 1830.

“ Q. Have you in your possession the deed mentioned in the *subpœna duces tecum* served upon you ?

“ A. I have a deed in my possession, made between the parties named in the *subpœna duces tecum*, but whether it is the deed mentioned I do not know.

“ Q. Does the deed bear the same date as that in the *subpœna* ?

“ A. The deed, on inspection, will show that.

“ Q. I call on you to produce the deed in your possession. Will you do so ?

“ A. I decline to produce the deed that I have in my possession, because I have a lien upon it. Upon that lien being satisfied I am ready to give it up. I claim the lien under Benjamin Norton and Edward Spencer Norton, and any other person liable to me.

“ Q. How did your lien arise ?

“ A. For the preparation of the deed and the arrangements consequent upon it, and carrying it out. I have not carried in any claim against Benjamin Norton's estate. I sent my bill against Benjamin Norton to Mr. Currie, who I thought was his executor, and he returned it to me ; it is about twenty years since I sent it in. I have not carried in any claim under the suit for administering Benjamin Norton's estate. I have not made any claim against Edward Spencer Norton or his estate. I do not know that he is dead.”

On the 3d of May the defendants, on whose behalf the appellant had been served with the *subpœna duces tecum*, * 333 caused him to be served with a notice of motion that he might be ordered to produce before the examiner, and at the hearing, the deed in question, and to pay the costs occasioned by his refusal to produce it before the examiner, and of the motion. The Master of the Rolls, after hearing counsel for the defendants and for the witness, made the order under appeal, which also ordered that the defendants' costs should be costs in the cause.

Mr. Follett and *Mr. Edmund James*, in support of the appeal. — The appellant cannot be called on to produce the deed until his costs are paid. If his clients were living they might, perhaps, be compelled to produce the deed, and for that purpose might be compelled to pay the amount due to the solicitor so as to free the document from his lien. But their representatives are not before the Court.

[THE LORD JUSTICE KNIGHT BRUCE. — Can a lien on a document give a witness greater privilege as to withholding it than the absolute property in it would? If it were the witness's property, and contained material evidence, could he refuse to produce it? The question as to the propriety of the representatives of the owners of the deed being before the Court is a different one, but the witness has not made any objection upon that ground.]

We submit that the defendants cannot be permitted to gain any advantage by calling the solicitor as a witness, without calling the parties to whom the deed belongs, and in whose absence he has no right to produce it.

They referred to *Doe v. Ross*, (a) *Griffith v. Ricketts*, (b) *Thompson v. Mosley*, (c) *Kemp v. King*, (d) *Re * Oxford* * 334 and *Worcester Extension and Chester Junction Railway*, (e) *Pickering v. Noyes*, (g) *Ex parte Shaw*, (h) *Liddell v. Norton*, (i) *Warburton v. Edge*. (k)

(a) 7 M. & W. 102.

(b) 7 Hare, 299.

(c) 5 Car. & P. 501.

(d) 2 Moo. & Rob. 437.

(e) 1 De G. & S. 728.

(g) 1 Barn. & C. 262.

(h) Jacob, 270.

(i) 1 Kay, App. xi.

(k) 9 Sim. 508.

Mr. R. Palmer and *Mr. Amphlett*, for the respondents, referred to *Brassington v. Brassington*, (a) *Furlong v. Howard*, (b) *Commerell v. Poynton*, (c) *Ross v. Laughton*, (d) *Pelly v. Wathen*. (e)

Mr. Follett replied.

Judgment reserved.

June 30.

THE LORD JUSTICE KNIGHT BRUCE. — *Mr. Clipperton*, a solicitor, or formerly a solicitor, has in his possession a deed, which we must, for present purposes, take to be a deed of assignment from *Mr. Edward Spencer Norton*, now deceased, to his father *Mr. Benjamin Norton*, also now deceased, of a share in the proceeds of the sale of an estate.

This deed is the subject of the order under appeal. *Mr. Clipperton*, who prepared the deed as the solicitor of one or both of those two gentlemen, claims a lien upon it for professional costs, alleged, probably with truth, to be due to *Mr. Clipperton* from *Mr. Edward Spencer Norton* and *Mr. Benjamin Norton*, or from one of them. But *Mr. Clipperton* has not any other title or * 335 *right to the deed, which, subject or not subject to the lien claimed by him, belongs, as I collect, to the representatives of *Mr. Edward Spencer Norton* and *Mr. Benjamin Norton*, or of one of them, and is required by the three defendants in this cause, who obtained the order under appeal, to be produced and proved in evidence in the cause for them against the plaintiffs, who deny, and are interested in denying, while those three defendants assert, and are interested in maintaining, that the sale, of which a share in the proceeds must be taken to have been assigned, as I have said, by the deed, was a valid sale or cannot be disturbed; the right, or absence of right, to dispute and impeach the sale being the main or only question in the suit; and upon that question those three defendants, with apparent reason, allege that the deed would be useful evidence for them, as showing an adoption or confirmation of the sale by *Edward Spencer*

(a) 1 Sim. & St. 455.

(d) 1 Ves. & B. 349.

(b) 2 Sch. & Lef. 115.

(e) 1 De G., M. & G. 16.

(c) 1 Swanst. 1.

Norton, who, if he were alive and had not executed the deed, would be one of the persons interested in disputing, and entitled to dispute, the sale, upon the supposition that it is disputable.

The respective representatives of that gentleman and of his father are said, and I suppose with truth, not to be in those characters parties to the cause.

The sale of the estate, I believe, preceded the assignment, but was not made either by the son or by the father; the latter's consent, however, was one of the conditions necessary to its validity, and was given, as I understand, also before the assignment. The defendants, who obtained the order, do not claim, do not in any other sense claim, under Benjamin Norton, neither do these defendants claim under Edward Spencer Norton. Nor has Mr. Clipperton any demand whatever against these defendants, whose present object merely is to establish * by proof of the deed * 336 that Edward Spencer Norton did an act confirmatory of the sale.

If Benjamin Norton and Edward Spencer Norton were now alive, and either of them had actual possession of the deed, he would be compellable certainly to produce it for the purpose of evidence at the instance of these defendants. Why then, subject to the qualification which, mentioned by us during the argument, I am about to notice again, should not Mr. Clipperton do so? I think that he ought.

Whether, if Benjamin Norton and Edward Spencer Norton were now living, and both or either of them were now applying that Mr. Clipperton should produce the deed for the purpose of being given in evidence, the application would succeed, is a different point, upon which I do not express any opinion.

His motion must be refused, but without prejudice to his right, if any, to require service upon or notice to the respective representatives of Benjamin Norton and Edward Spencer Norton before producing the instrument. This objection, however, seems not to have been taken before the matter was brought hither, or to have been a ground of the present motion, of which, as it appears to me, Mr. Clipperton should pay the costs.

I may add, that having asked one of the fifteen Judges how, in his opinion, a case like the present ought to be treated at *Nisi Prius*, he informed me, without hesitation, that the production of

the deed for the purpose of being given in evidence would be enforced, but, of course, without interfering otherwise with the possession.

* 337 *THE LORD JUSTICE TURNER. — This was a motion to discharge an order made by the Master of the Rolls upon Mr. Clipperton, formerly a solicitor but not now practising, for the production by him before the examiner of a deed, for the production of which a *subpœna duces tecum* had been served upon him.

Mr. Clipperton, it appears, is not the solicitor of any of the parties in the cause, nor, as I understand, for any persons whose representatives are in that character parties in the cause ; but he prepared the deed in question many years ago for persons who are now deceased, and he claims a lien upon it for costs due to him from the estates of those persons. It is upon the ground of that lien he refused to produce the deed.

I had so long considered this point to be settled by the case of *Brassington v. Brassington*, (a) to which I may now add that of *Bradshaw v. Bradshaw* as reported in Russell & Mylne, (b) that it was not without surprise that I heard this motion opened. But so many cases were cited in the argument, that I desired to look into them before disposing of the motion, the more so as it was said that the authorities were conflicting. Upon examining them, however, this does not appear to me to be the case, any further than that under different circumstances there are, as there necessarily must be, different decisions.

Of these cases cited, there are two cases which, in my opinion, may at once be laid aside. First, the cases in which the application to the Courts has been, not for the production of * 338 documents under a *subpœna duces tecum*, * but for the delivery up of the documents ; and, secondly, the cases in which the person requiring the production has been the person against whom the solicitor has claimed the lien. It is manifestly a different question, whether documents ought to be delivered up, and whether they ought to be produced, and a different question also, whether the production can be enforced by the person against whom the lien is claimed, and whether it can be enforced by a

(a) 1 Sim. & St. 455.

(b) Vol. I. p. 353.

third person. The cases *Ex parte Shaw* (a) and *Warburton v. Edge* (b) are of the first class. The case of *Kemp v. King* (c) is of the second.

Another class of cases was also referred to, which has as little to do with the question before us, the cases as to the obligation resting upon a defendant to satisfy his solicitor's lien in order to production, of which *Liddell v. Norton* (d) is an instance. Such cases depend upon the duty of the party and not of the witness.

The only cases cited in support of this motion, which, as it seems to me, can be said to have any bearing upon the question, are those of *Doe v. Ross* (e) and *Griffith v. Ricketts*. (g) The case of *Doe v. Ross*, (e) instead of supporting the appellant's case, is, I think, opposed to it, for whatever may have been the facts of that case, it is clear that in the judgment the Court proceeded on the ground that Baxter was a mortgagee, and, therefore, as it is expressed in the judgment, had a title of his own, and not a title depending merely upon that of Weetman his client; and from this and what follows — that if the objection had been taken at the trial, it might have been cured by calling Weetman, — it seems to me to be clear, * that the Court considered * 339 that, if Baxter had not been a mortgagee, the question would have depended upon Weetman's title and not upon Baxter's. And with reference to *Griffith v. Ricketts*, (h) I certainly cannot agree to what is reported to have been said by the Vice-Chancellor, that the lien of a solicitor is, in substance, the same as a mortgage, nor do I believe that the Vice-Chancellor said this. His observation, I have no doubt, had reference to the title of Rosina Frost, who, it appears, claimed under a mortgage. To suppose that he could intend to place a solicitor's lien upon the same footing as a mortgage title, would be to impute to him a position quite at variance with his general accuracy. These cases, therefore, leave the decisions in *Brassington v. Brassington*, (i) *Thompson v. Moseley*, (k) and the other cases referred to, upon the general question, whether the production can be resisted upon the mere

(a) Jac. 270.

(b) 9 Sim. 508.

(c) 2 Moo. & Rob. 437.

(d) Kay, App. xi.

(e) 7 M. & W. 102.

(g) 7 Hare, 299.

(h) 7 Hare, 299.

(i) 1 Sim. & St. 455.

(k) 5 Car. & P. 501.

ground of lien, quite unaffected ; and this case must, upon that point, be governed by those decisions.

Upon the subordinate point, which was suggested in argument, whether the production ought to be enforced in the absence of the persons now representing the late clients of Mr. Clipperton, it is unnecessary for us to give any opinion, as the point has not yet been raised by the witness, and, under the circumstances of this case, perhaps never may be raised by him ; but I think the order should be expressed to be without prejudice to that question. The Master of the Rolls, however, would probably have so qualified the order, if he had been asked to do so, and I think, therefore, the point ought not to affect the costs of the motion, which must be paid by Mr. Clipperton.¹

1855. June 11, 12, 28, 30. Before the LORDS JUSTICES.

Held, by Lord Justice TURNER, confirming a decision of the Master of the Rolls, and *semble*, per Lord Justice KNIGHT BRUCE, that under the General Enclosure Act, 8 & 9 Vict. c. 118, gavelkind land may be exchanged for lands held in common socage.

But *held*, by Lord Justice KNIGHT BRUCE, that, however this might be, an experienced solicitor purchasing subject to a condition of sale stating that the property which was in Kent was in the course of being exchanged under the Act for lands in Middlesex, and that the title would be that to the Middlesex lands, could not successfully resist a specific performance on the ground of a doubt as to the construction of the Act of Parliament.³

THIS was an appeal from the decision of the Master of the Rolls, reported in the 20th volume of Mr. Beavan's Reports, (a) directing a specific performance of an agreement for the purchase by the defendant from the plaintiff of lands in Kent, of gavelkind tenure, which had

(a) Page 269.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 909.

² S. C., 1 Jur. N. S. 410, 692 ; 24 L. J. Ch. 545.

³ See Sugden V. & P. (14th Eng. ed.) 374, 375.

been the subject of an exchange under an enclosure Act for lands in Middlesex.

The agreement had been made subject to conditions of sale, of which the fifth contained special stipulations as to specific portions of the property, the title to which was not in dispute, and the sixth was as follows : —

“ The remainder of the property comprised in the particulars and plan is in the course of being exchanged for fee-simple property in Middlesex, under the provisions of the Acts of Parliament for the enclosure, exchange, and improvement of land, and which exchange has proceeded so far as the issuing of advertisements preliminary to the order for the exchange being confirmed by the enclosure commissioners. The effect of such exchange will be to transfer to the property comprised in this sale the title which, up to the completion of the exchange, was or is applicable to the Middlesex property. The title therefore which the vendor will produce to the property comprised in this sale (beyond the small portions mentioned in the fifth condition) will be that relating to the Middlesex * estate ; and the vendor shall not be * 341 required to produce, nor shall any objection or requisition be made or taken in respect of, the title applicable to the property mentioned in the foregoing particulars prior to the completion of such exchange, and it shall not be an objection that the vendor does not deliver with the other abstracts an abstract of the order for the exchange duly confirmed by the commissioners, but it shall be sufficient if he deliver such last-mentioned abstract and produce the order for exchange at any time before the completion of the purchase, and such production shall be deemed conclusive evidence that the exchange has been duly effected and completed under the above-mentioned Acts.”

The questions were : first, whether the exchange was valid under the provisions of the General Enclosure Acts, the lands exchanged being of different tenures ; and secondly, whether, if it were not, any objection on this ground was precluded by the conditions of sale. The Master of the Rolls decided the former in the affirmative, and the defendant appealed.

Mr. Roupell and *Mr. Pole*, for the plaintiff.

Mr. R. Palmer and Mr. Robson, for the defendant.

Mr. Roupell, in reply. — The nature of the arguments appear sufficiently from the judgments.

The following authorities were referred to: Coke Lit., (a)
 * 342 Wright's Tenures, (b) 2 Blackst. Com., (c) *Johnson* * v.
Smiley, (d) Robinson on Gavelkind, (e) *Hawkins* v. *Gath-
 ercole*. (g)

Judgment reserved.

June 30.

THE LORD JUSTICE TURNER. — This case involves two points: one upon the effect of the conditions under which the property in question has been agreed to be sold, the other upon the extent of the powers of the enclosure commissioners as to exchanges of lands not connected with enclosures made under the provisions of their Acts.

The first of these questions, that upon the effect of the conditions, would probably of itself be sufficient to decide the case before us in the plaintiff's favour, but the Master of the Rolls has not disposed of the case upon that ground. He has in a most careful and well-considered judgment entered at length into the question as to the powers of the enclosure commissioners, and, having regard to the importance of the question, as affecting the titles to estates already exchanged under the Acts, and to the future exercise of the commissioners' powers, I think it better to pursue the same course. I do so the more readily, as my opinion upon the subject coincides with that of the Master of the Rolls.

It is not material to travel into the facts of the case. The enclosure commissioners, assuming to act under the powers
 * 343 given by their Acts, have confirmed an exchange * of gavelkind lands in Kent from common socage lands in Middlesex, and the question is whether a title depending on this exchange can be forced upon a purchaser. The question as to the power of

(a) Pages 53 b, 116 a.

(d) 17 Beav. 223.

(b) Pages 203, 206, 4th ed.

(e) Book I. chap. 5.

(c) Pages 79, 84.

(g) 6 De G., M. & G. 1.

the commissioners depends upon the 147th section of the first of their Acts, 8 & 9 Vict. c. 118. That section is as follows:—

“That it shall be lawful for the commissioners, upon the application in writing of the persons interested, according to the definition hereinbefore contained in lands not subject to be enclosed under this Act, or in lands subject to be enclosed under this Act, as to which no proceedings for an enclosure shall be pending, and who shall desire to effect an exchange of lands in which they respectively shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands; and in case the commissioners shall be of opinion that such exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall, unless notice of dissent to the proposed exchange shall be given under the provision hereinafter contained, cause to be framed, and confirmed under the hands and seal of the commissioners, an order of exchange, with a map or plan thereunto annexed, in which order shall be specified and shown the lands given and taken in exchange by each person so interested respectively; and a copy of such order, under the seal of the commissioners, shall be delivered to each of the parties on whose application the exchange shall have been made; and such order of exchange shall be good, valid, and effectual in the law to all intents and purposes whatsoever, and shall be in no wise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be and enure to, for, and * upon the same uses, trusts, intents, and purposes, and * 344 subject to the same conditions, charges, and incumbrances, as the lands given on such exchange would have stood limited or been subject to in case such order had not been made; and all expenses with reference to such order and exchange, or the inquiries in relation thereto, or to any proposed exchange, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken: provided always, that no exchange shall be made of any land held in right of any church or chapel or other ecclesiastical benefice without the consent testified in writing of the bishop of the diocese and the patron of such benefice.”

The terms of this section are perfectly general, and no reasonable doubt can be entertained that its language extends to and embraces all freehold lands wherever such lands may be situate, and whatever may be the incidents of the tenure, with the exception only of lands subject to be enclosed under the Act, and as to which proceedings for an enclosure may be pending. It was, indeed, scarcely attempted to be denied at the bar, that if the case stood upon this section alone, the power of the commissioners to order the exchange in question would be beyond all reasonable doubt; but it was said on the part of the defendant the purchaser, that the earlier parts of the Act distinguish between lands subject to be enclosed, and lands not subject to be enclosed; and that the true meaning of the 147th section of the Act, was only to give the commissioners power to order exchanges of enclosable lands, which, in the earlier parts of the Act, were described as lands not subject to be enclosed,—to give them the same power over those lands as is given by the 92d section over lands in the course of enclosure,

the 92d section enacting thus: “That it shall be lawful for * 345 the valuer to allot and award any land to be *enclosed in exchange for any other land within the parish in which the land to be enclosed shall be situate, or any adjoining parish, and it shall be lawful for the valuer, in exercise of this present power, to allot all or any part of the land which would have been subject to be allotted under this Act, for the purposes of exercise and recreation, or for the labouring poor, or for any other public purposes, to any person in exchange for other land in the parish, or in any adjoining parish, which shall appear to the valuer more suitable or convenient for the purposes of exercise and recreation, or for the labouring poor, or for such other public purposes as aforesaid, and to allot such other land for such purposes accordingly, and all lands taken and allotted as aforesaid under this provision, although not situate in the parish in which the land given in exchange for the same shall be situate, shall, for the purposes of the provisions herein contained, be deemed to be within such parish, and be managed and dealt with accordingly: provided that all exchanges under which land shall be taken and allotted for public purposes as aforesaid, shall be made with the consent of the person interested in the land so taken, and that all other exchanges be made with the consent in writing of the persons interested in the lands so exchanged, and every such exchange so to be made shall

be valid and effectual to all purposes, and shall be specified and declared in the award; provided also, that no exchange shall be made of any land held in right of any church or chapel, or other ecclesiastical benefice, without the consent testified in writing of the bishop of the diocese and the patron of such benefice: provided also, that all costs and expenses attending the making and completing of any such exchanges, except exchanges of land taken for public purposes, shall be borne by the several parties making such exchanges, in such manner and in such proportions as the valuer shall direct, and in * case of non-payment thereof, * 346 shall be recovered in the manner directed with respect to the recovery of penalties and forfeitures, and the expenses of the exchanges of land taken for public purposes shall be considered part of the expenses of the enclosure."

It was further said, on the part of the defendant, that with reference to the provisions of the 92d section, confining the power of exchange in cases of pending enclosures to lands in the same or an adjoining parish, and with reference also to the provisions of the 93d and 94th sections, the 93d section enacting that the Act should not extend to prejudice any person having any right or claim of dower, jointure, annuity, portion, debt, or other incumbrance upon or affecting any of the land to be enclosed, or which should be exchanged or given in partition in pursuance of the Act; and the 94th section being in these terms: "That all such land as shall be taken in exchange, or on partition, or be allotted by virtue of this Act, shall be held by the person to whom it shall be given in exchange, or on partition or allotted, under the same tenures, rents, customs, and services as the land in respect of which such land shall have been given in exchange, or on partition or allotted, would have been held in case no such exchange, partition, or enclosure had been made, and the land taken in exchange, or on partition or allotted, in respect of freehold, shall be deemed freehold, and the land taken in exchange, or on partition or allotted, in respect of copyhold or customary land, shall be deemed copyhold or customary land, and shall be held of the lord of the same manor, under the same rent, and by the same customs and services as the copyhold or customary land in respect of which it may have been taken in exchange, or on partition, or allotted, was or ought to have been held, and shall pass in like manner

* 347 as the copyhold or customary land in respect * whereof such exchanges, partitions, or allotments shall be made; and as to copyhold or customary allotments, without any new admittance in respect of the lands taken or allotted respectively, and the land given in exchange, or on partition, or allotted in respect of leasehold land, shall in like manner be deemed leasehold, and shall be held under the same rents and covenants as the land in respect of which it may have been allotted was held, and the remainder or reversion thereof shall be vested in the same lessor respectively as the remainder or reversion of such other land was vested before the exchange, partition, or allotment, except where otherwise particularly directed by this Act," — the power of the commissioners under the 147th section of the Act, ought to be so limited as to disable them from ordering exchanges of lands situate in different and distinct places, or of freehold lands which by tenure are subject to distinct incidents.

The words of the 147th section, however, being so wide and general as I have mentioned, we are bound, before adopting any of the limited constructions for which the defendant has been contending, carefully to examine the other provisions of the Act. Upon examining them, they will be found, as it seems to me, by no means to warrant those limited constructions. First. With reference to the power of exchange given by the 147th section being confined to enclosable lands, described in the earlier parts of the Act as lands not subject to be enclosed, this construction would, in any event, be difficult, as it requires the introduction into the section of new and additional words. In order to give effect to it, it would be necessary to read the section as if the words were not, "upon the application of persons interested in lands not subject to be enclosed," but "upon the application

* 348 of persons interested in enclosable lands, * which are hereinbefore declared not to be subject to be enclosed." This, no doubt, might be done if the context warranted it, but when we look at the context, what foundation do we find for this restricted interpretation of the words which the legislature has used?

The lands which are not to be subject to be enclosed are defined in the 12th, 13th, 14th, and 15th sections of the Act. Upon examining those sections, it will be found that the only enclosable lands not subject to be enclosed are the lands in the New Forest,

and the Forest of Dean, and the town greens and village greens mentioned in the 13th and 15th sections, for as to the other lands which are mentioned in the 12th and 14th sections, the Act merely prescribes that they shall not be enclosed without the authority of Parliament.

What then is the conclusion to which this limited construction leads? Necessarily this, either that the lands mentioned in the 12th and 14th sections (the lands which are not subject to be enclosed without the authority of Parliament) are lands falling within the power of exchange given by the 147th section, or that that power extends only to the lands mentioned in the 13th and 15th sections (the lands in the New Forest, and Forest of Dean, and the town greens and village greens). It is impossible, I think, to suppose that either of these conclusions would meet the views of the legislature in the 147th section of this Act. To adopt the former conclusion would be to suppose that the legislature meant to give the commissioners powers of exchange over lands within certain distances from large towns, but to withhold the power as to lands beyond those distances; and to adopt the latter conclusion would be without any assignable reason to confine the power within limits * within which hardly any useful purpose could be answered by the exercise of it. * 349

I may add that this limited construction of the words of the 147th section seems to me also to be wholly repugnant to the spirit of the Act, for not only does the recital show that the object was to facilitate such exchanges as might be beneficial, but all the provisions of the Act with reference to enclosures evince clearly that these commissioners were regarded by the legislature as persons in whom a wide discretion was intended to be reposed.

I am satisfied, therefore, that the limited construction of the words of the 147th section as to lands not subject to be enclosed, for which the defendant has contended, cannot be maintained; and after repeatedly considering the case I see no other construction by which those words can be limited, unless they can be controlled by reference to the 92d, 93d, and 94th sections of the Act, as it has been contended on the part of the defendant they ought to be. I am of opinion, however, that upon the sound construction of the Act we cannot venture so to control them. It would, as it seems to me, be a mere arbitrary act of assumption on our part to apply to the provisions of the 147th section the

limits as to locality which are prescribed by the 92d section. The language of that section is precise. The language of the 147th section is general. How can we venture to say that the intention was in each case the same? And if we cannot justify the conclusion that the 147th section was intended to be controlled as to the locality of the lands to be exchanged by the earlier sections of the Act, on what ground are we to conclude that it was intended to be so controlled as to other matters?

* 350 * The argument that the 147th section is to be construed with reference to the earlier provisions of the Act becomes more difficult when it is observed that exchanges under the 92d section are under the direction of the valuer, and unless objected to would not, as it would appear, be brought under the supervision of the commissioners otherwise than as part of the general scheme of enclosure, but that exchanges under the 147th section fall directly under the supervision of the commissioners.

Great reliance was placed in the argument upon the prejudice which might ensue to tenants in tail and others by lands held under tenures, of which the incidents are different, being permitted to be exchanged under the Act; and this part of the argument was enforced by reference to the 93d and 94th sections. The Master of the Rolls, I observe, has been of opinion that these sections do not apply to exchanges under the 147th section. The context, I think, rather tends to support that conclusion; but I think it unnecessary to give, and do not mean to give, any opinion upon the point. Assuming the sections to apply, the only consequence would be that in cases of exchanges of estates held under tenures with different incidents, the exchanges might alter the interests of the owners, which, by the terms of the 147th section, are put under the protection of the commissioners, who are constituted the judges whether the proposed exchange is beneficial to the owners. Such cases must necessarily be rare. The possibility of their occurrence may perhaps have escaped the attention of the legislature, but I cannot venture to hold that this is a sufficient ground for abridging a power which the words of the statute, in my opinion, are adequate to confer.

* 351 Discretionary powers of this nature are not unknown * to this Court. Trusts may be created to purchase and entail lands in England or Scotland at the discretion of the trustees. The rights under the entail in the two countries would be different,

but yet this Court does not, as I apprehend, interfere with the discretion of the trustees so long as it is *bond fide* exercised. Are we to say that the legislature could not intend to repose in these commissioners that species of discretion which this Court would respect if vested in a trustee? Again in the case of a sale of gavelkind lands under a trust to sell and lay out the money in the purchase of lands to be settled to the same uses, it has been held by this Court that there is no equity on the part of the gavelkind heir to have the purchase-moneys reinvested in gavelkind lands. *Hougham v. Sandys. (a)* Are we to hold that the possible alteration of rights which does not control the execution of a trust shall yet be held to control the language of the legislature under such an Act as this?

It may well be added that the subsequent Acts clearly evince the intention of the legislature that this Act should have an extended operation. To limit its operation upon grounds which cannot be represented as otherwise than conjectural, would, I think, be acting contrary to that intention. For these reasons, in addition to those which have been so forcibly put in the judgment of the Master of the Rolls, I concur with him in opinion upon the construction of this Act. I agree with him also in thinking that there is not any such doubt upon the question as would warrant us in refusing a specific performance.

I am of opinion, therefore, that this appeal must be dismissed and with costs.

* THE LORD JUSTICE KNIGHT BRUCE. — It is unnecessary * 352 to say how I should have thought it right to dispose of this case if I had been persuaded of the invalidity of the exchange in question as an exchange under the Acts of Parliament that have been so much canvassed in the cause; for I am not so persuaded, and, on the contrary, the inclination of my opinion is in favour of the validity of the exchange.

So viewing the matter, I think that if the point is not perfectly clear in the plaintiff's favour the fifth and sixth conditions of sale cannot in this respect be disregarded, — cannot but have weight attributed to them in the present contention, — cannot but preclude an experienced and able member of the legal profession, such as

the defendant, from objecting to the title on grounds which (the whole of the property that he has purchased being in the parish of Brasted in Kent, and the sixth condition of sale mentioning the county of Middlesex as it does) must, I conceive, be taken to have been by that condition pointedly and distinctly brought under his observation and attention.

* 353 *In the Matter of the Trust Estate of JOHN CLARK LANGMEAD, and In the Matter of the 10th & 11th VICT. c. 96.

1855. June 23, 25. July 13. Before the LORDS JUSTICES.

By a deed executed on a dissolution of partnership in 1826, reciting that it was thereby intended finally to settle all disputes and controversies between the partners, the retiring partner agreed to assign his interest in the partnership property to the continuing partner, subject to the payment of the former's share in the partnership debts, and the continuing partner agreed to enter into a covenant to pay the partnership debts, and indemnify the out-going partner against them. In 1831, a policy of assurance, part of the partnership assets, was assigned by the continuing partner to a mortgagee, with notice of the deed of dissolution. The retiring partner died, and the continuing partner became bankrupt, whereupon partnership debts left unpaid by him were proved in a suit for the administration of the estate of the deceased partner.

1. *Held*, by Lord Justice TURNER, that, on the true construction of the whole deed, a lien was not intended to be created on the policy in respect of the unpaid partnership debts.
2. *Held*, by Lord Justice KNIGHT BRUCE, that, if it had been, still the mortgagee of the policy from the surviving partner was not bound to see to the application of the mortgage-money, and was justified in supposing that it would be properly applied.¹

THIS was an appeal from the decision of the Master of the Rolls on a petition under the Trustee Relief Act. The case is reported

¹ See 1 Lindley Partn. (Eng. ed. 1860) 578-580, 2 *ib.* 714; Lewin Trusts (5th Eng. ed.), 336, 337; Stroughill v. Anstey, 1 De G., M. & G. 635, n. (2), and cases cited; Sugden V. & P. (14th Eng. ed.) 657 *et seq.*; 2 Sugden V. & P. (7th Am. ed.) 298 [834] *et seq.* and notes; Perry Trusts, § 795, and cases in note (2); 2 Story Eq. Jur. § 1127; 1 Lead. Cas. in Eq. (3d Am. ed.) 104 [54], 124 *et seq.*

in the 20th volume of Mr. Beavan's Reports ; (a) but as the judgment of one of their Lordships on the appeal turned on the construction of a deed and the circumstances preceding and attending its execution, a more detailed statement of these circumstances and of the deed is here requisite.

In 1800 Philip Langmead carried on business with his sons, John Clark Langmead the elder and William Langmead, and another partner named Elliott.

By an indenture dated the 17th of September, 1800, being a deed of dissolution of this partnership, in consideration of 6000*l.* paid by John Clark Langmead the elder and William Langmead to Philip Langmead, the interest of Philip Langmead in the partnership property was assigned and conveyed to John Clark Langmead the elder and William Langmead, "subject nevertheless to the payment of his, the said Philip Langmead's, * part or share of all such debts, sum and sums of money " * 354 as were then due and owing from the said trade or business, or from the said Philip Langmead in respect thereof, to any person or persons whomsoever, and subject to the rents, covenants, and agreements contained in the leases under or by virtue of which the leasehold messuages or dwelling-houses and premises were held. After the retirement of Philip Langmead, the business was carried on by John Clark Langmead the elder, William Langmead, and Mr. Elliott till April, 1814, when Mr. Elliott retired, and after his retirement it was carried on by John Clark Langmead the elder and William Langmead, with two additional partners named William John Clark, and John Clark, who soon afterwards retired.

On the 30th of April, 1815, John Clark Langmead the elder died, and was succeeded in the partnership by his son and executor John Clark Langmead, who, with his brother William Clark Langmead, were residuary legatees under a testamentary disposition made by John Clark Langmead the elder.

By articles of agreement dated the 5th of February, 1825, and made between John Clark Langmead the son of the one part, and William Langmead of the other part, the partnership between them was agreed to be dissolved ; and it was upon the construction and operation of this instrument that the question arose.

The deed contained recitals to the effect already stated, and also among others the following: "And whereas upon the death and intestacy of the said John Clark Langmead the father, so far as regarded his real estate, his son John Clark Langmead, party hereto, became seised of or entitled to all such parts of the freehold messuages or dwelling-houses, tenements, and here-

* 355 ditaments belonging * to the said trade or business as were the share of his late father, and by virtue of the said testamentary paper became possessed of or entitled to a moiety of all such parts of the leasehold messuages or dwelling-houses and tenements, stock in trade, debts, brewing utensils and implements belonging, due, and owing to the said trade or business as were the share of his late father, and the said William Clark Langmead became possessed of or entitled to the other moiety of such leasehold chattel interests; and whereas after the retirement of the said William John Clark from the said copartnership, the said John Clark Langmead, party hereto, and William Langmead carried on the said trade or business together, under the firm of Langmead & Co., the said John Clark Langmead, party hereto, being entitled in his own right to certain parts or shares of and in the freehold messuages or dwelling-houses and hereditaments belonging to the said trade or business, and in the right of himself and of his brother, the said William Clark Langmead, also to certain parts of the leasehold messuages or dwelling-houses and tenements, stock in trade, brewing utensils and implements, except certain parts of the brewery premises in Great Hoe Lane, in the borough of Plymouth aforesaid, which were and are the sole property of the said William Langmead; and whereas the part or share of the said William Clark Langmead of and in the leasehold messuages or dwelling-houses, stock in trade, implements and utensils, chattels and effects whatsoever, belonging or appertaining to the said brewery which he the said William Clark Langmead has become possessed of or entitled to under and by virtue of the said testamentary paper of his late father, the said John Clark Langmead deceased, is subject and liable to the payment of a proportionate part of the just debts of his said father, deceased; and whereas for preventing suits and controversies touching the matters aforesaid, and for the purpose

* 356 * of coming to a general and final settlement of all accounts of every description whatsoever between the said par-

ties hereto, not only in their own respective characters as partners as aforesaid, but also as the administrator with the will annexed of the said John Clark Langmead deceased, and as the executor of the said Philip Langmead deceased, the said John Clark Langmead, party hereto, and William Langmead, have concluded and agreed to put an end to their copartnership upon the terms and in manner hereinafter mentioned."

By the witnessing part John Clark Langmead, for himself, his heirs, executors, and administrators, covenanted with William Langmead that he John Clark Langmead, his heirs, executors, or administrators (in consideration of the sum of 2000*l.* to be paid to him or them by William Langmead, and also in consideration of the general releases which were to be given to each other in manner thereafter mentioned), would, on the 25th of March then next, convey, assign, and assure unto William Langmead all the share, right, title, and interest of him John Clark Langmead in all the stock in trade or business of a brewer, and also all the several debts, rents, and moneys then due to the copartnership, together with all the mortgages, bonds, notes of hand and other securities, vouchers, and books touching or concerning the same (except a certain debt therein mentioned); and also all the part and share of him John Clark Langmead of the freehold chattels, real and leasehold messuages or dwelling-houses, tenements, and hereditaments, with the appurtenances, belonging to the said copartnership, "to hold the same, with their several and respective appurtenances, and according to the several natures and quality of the said estates and property, unto the said William Langmead, his heirs, executors, administrators, and assigns for ever, or (as the case may be) * absolutely for his and their own * 357 use and benefit, subject nevertheless to the payment of the part or share of him, the said John Clark Langmead, party hereto, in his own right and in the right of his brother, and also as the administrator of his said late father, of and in all such debts and sum and sums of money and mortgages as are now due and owing from the said trade or business or from the said John Clark Langmead, party hereto, or the said William Clark Langmead in respect thereof, to any person or persons whomsoever, and subject to the payment of such yearly rent and heriots, and to the performance of such suits, services, covenants, conditions, and agreements as are reserved and contained in the leases under which the

said leasehold messuages and tenements belonging to the said trade or business are held, and subject also to the agreement entered into by the said John Clark Langmead, party hereto, and William Langmead, with the said Edward Scott, by which the said Edward Scott will have the option of purchasing the said brewery and brewery utensils and other implements at the time and in manner hereinbefore mentioned."

By the same deed William Langmead covenanted that he would, upon execution of such due and effectual conveyance and assignment by John Clark Langmead, pay to John Clark Langmead the sum of 2000*l*. And it was thereby mutually agreed, that the copartnership should be dissolved and cease on the 25th of March then next; and that each of them, John Clark Langmead and William Langmead, should, on the 25th of March, release unto the other of them, his heirs, executors, and administrators, all claims and demands by reason of the copartnership; and that for the purpose of carrying into effect that agreement, all proper and neces-

* 358 sary deeds, conveyances, assignments, assurances and * re-
leases should be prepared and executed by the parties thereto, and all other proper parties, on or before the 25th of March then next; and it was thereby further agreed, that in such deeds or instruments, or some or one of them, should be contained a covenant or assurance on the part of John Clark Langmead, that he had not released or incumbered his share, or the share of his brother William Clark Langmead, in the said copartnership property, and that he would, after the 25th of March then next, do all lawful and necessary acts at the expense of William Clark Langmead, for recovering any of the debts due to the said trade, or for the purpose of enabling him to sell and dispose of the lands and property belonging thereto, and that he would enter into all necessary instruments and other assurances for any of the said purposes. There was also a covenant by William Langmead, that he would pay all debts and demands of or upon the said joint trade or business, and indemnify John Clark Langmead and William Clark Langmead and their respective estates, against the same.

The dissolution of the partnership took place according to the agreement, but the 2000*l*. was not paid until several years afterwards. No conveyances of the partnership property were ever made by John Clark Langmead, and the mutual releases provided for by the agreement were never executed; but, nevertheless, Wil-

liam Langmead took possession of all the partnership property and effects, and for many years afterwards carried on the business alone.

On the 25th of December, 1830, John Clark Langmead died, and a suit was soon afterwards instituted for the administration of his estate. The petitioner William John Fleming Langmead was his residuary legatee and devisee.

* By an indenture dated the 1st of September, 1831, * 359 William Langmead (who had in his possession the policy on the life of William Winsor) assigned it, with other securities, to Walter Boyd, for securing a sum of 4000*l.* due from William Langmead.

William Langmead did not pay all the debts owing from the partnership according to the articles of dissolution, and debts due from the firm to a large amount were proved by creditors of the partnership, against the estate of John Clark Langmead, in the administration suit.

On the 23d of June, 1840, William Langmead was declared a bankrupt.

In 1841, William Winsor died; and thereupon the legal representatives of Walter Boyd, who was then dead, applied for payment of the money secured by the policy, but the insurance office required for that purpose the authority or receipt of the executors of John Clark Langmead, the son.

An arrangement was then come to, that the executors of Walter Boyd and of John Clark Langmead should concur in the necessary receipt to the insurance office, and that the money, when received, should be invested in exchequer bills in the names of trustees, without prejudice to the rights of the parties entitled to receive the money, which were to remain in all respects the same as if the policy had been unreceived.

The investment and deposit were made accordingly, and in July, 1853, the trustees under the agreement of deposit paid and transferred the trust fund into Court under the provisions of the above Act, whereupon William * John Fleming Langmead * 360 presented a petition to the Master of the Rolls, praying that the fund might be transferred to him, after paying the costs, charges, and expensés of the trustees.

By the order of the Master of the Rolls, under appeal, dated the 13th of February, 1855, after a declaration that the trustees of

Walter Boyd were entitled to have the residue of the fund, after the payment of costs, applied in payment of their mortgage, and that the petitioner was entitled to the residue, accounts were directed to be taken for ascertaining the amount due on the mortgage, and directions were given for converting the fund in Court into money, and for its application according to the result of the account.

From this order the petitioner appealed.

Mr. Follet and *Mr. Cairns*, for the appellant.

They referred to *Jenkins v. Hiles*, (a) *Balfour v. Welland*, (b) *Burridge v. Row*, (c) *Robinson v. Lowater*, (d) *Gibson v. Goldsmid*. (e)

Mr. Lloyd and *Mr. Nalder*, for the executor of Walter Boyd.

Judgment reserved.

July 13.

THE LORD JUSTICE TURNER. — The conclusion at which I * 361 have arrived in this case is, * that the agreement of the 5th of February, 1825, was not intended to create, and did not create, a charge of the partnership debts, or of any part or share of those debts upon the property, which by that instrument was agreed to be conveyed and assigned by John Clark Langmead to William Langmead.

It appears by the agreement, that John Clark Langmead (the party to the instrument) was the executor of his father, John Clark Langmead, deceased, who had formerly been a partner with William Langmead, the other party to the agreement, and others in this brewery concern, and who, by his will, had given the residue of his personal estate, including his share of the leaseholds, stock in trade, debts, utensils, and implements belonging to the business, to his sons, John Clark Langmead and William Clark Langmead, in equal moieties. That John Clark Langmead, the party, had himself also been a partner with William Langmead in

(a) 6 Ves. 646.

(c) 1 Y. & C. C. C. 183, 583.

(b) 16 Ves. 151.

(d) 17 Beav. 592; 5 De G., M. & G. 272.

(e) 5 De G., M. & G. 757.

the brewery. That William Langmead had claims against John Clark Langmead, the party, as executor of his father, and in other characters, and that John Clark Langmead, the party, declined to settle these claims, unless a final settlement was at the same time come to of all accounts between the parties.

Under these circumstances, this agreement was entered into :
[His Lordship read the material parts as set out above.]

It is by these words that the charge for which the appellant has contended is said to have been created.

There is, I think, a material distinction between the effect of such words as these when used in a deed and when used in a will. Such words when used in a will must generally, though not in all cases, create a charge, *for there is generally, * 362 although not in all cases, no other purpose for which they could be used ; but when we find such words used in an instrument of this description, it is plain that they may have been used to limit and define the contract between the parties. The main question in this case, as it seems to me, is whether there is not enough on this instrument to show that this was the purpose for which the words were in this case used, and I am of opinion that there is.

There is here no distinct recital of the terms on which the parties had agreed to settle the questions between them. It is from the operative part of the instrument, therefore, we must collect those terms. If the words "subject to the payment," &c., had not been there introduced, what would there have been to show whether Wm. Langmead purchased, subject or not subject to the payment of these debts ? Before giving to these words the effect contended for by the appellant, we must consider what the consequence would be. If the words created a charge, they must have given the immediate right of filing a bill to enforce it. But this agreement was for the final settlement of all suits and controversies. Could the parties to the instrument intend to leave open such a right ?

Again, part of the property affected by the agreement was leasehold ; other parts, it appears, was subject to heriots. The agreement is that the property shall be held subject to the payment of the rents and heriots. Were the rents and heriots to be charges on all the property conveyed and assigned ? This point may be pressed yet more closely, for in immediate connection with the

debts are the mortgages to which some part of the property was subject. Was it intended to create a charge of the mortgage debts upon all the property?

* 363 *Further, all the estate, right, and interest of Wm. Clark Langmead is to pass by the conveyance and assignment. Would there not have been some mention here of the debts if it had been intended that it should be charged with the payment of them?

It is to be observed too, that the very words, "subject to the payment," are used in the recital of the instrument which defines the interest of Wm. Clark Langmead. [His Lordship read the recital, see *ante*, p. 353.] In addition to all this there are to be general releases and a covenant to indemnify.

Looking to all these provisions, and to the character of the property, I am satisfied that what the parties really intended in this case was, that the whole of J. C. Langmead's interest in the property should be conveyed and assigned free from any charge upon it, and that in the event of the debts not being paid he should take his remedy upon the covenants; that the parties here were, as Lord ELDON has expressed it, their own conveyancers, and that this Court would not have been justified in carrying out this agreement by creating a charge for payment of the debts.

My opinion, therefore, is, that the order which the Master of the Rolls made in this case is correct, and that this appeal must be dismissed, and dismissed with costs.

THE LORD JUSTICE KNIGHT BRUCE. — To what my learned brother has said, I will only add that if his construction of the agreement in question is correct, it must, of course, be perfectly clear that the order under appeal is right. But if, against

* 364 his opinion, *it ought to be taken that the instrument created a charge or trust in favour of John Clark Langmead, one of the parties to it, affecting the property in dispute, it was merely a trust for the payment, or a charge of debts not scheduled, not particularized, not specified;¹ and Mr. Boyd, I think, was entitled to believe, and ought to be taken as having believed, that his money was wanted, and would be applied for purposes, and in a manner consistent with propriety and the duty of Mr. Wm.

¹ See *ante*, 353 n. (1), and references.

Langmead under the agreement; for it is not shown that Mr. Boyd knew or had notice of any circumstance inconsistent with the fairness, propriety, or reasonableness of that belief on his part. The receipt, therefore, of Mr. Wm. Langmead was, in my opinion, a sufficient and effectual discharge to Mr. Boyd legally and equitably for the 4000*l.*, however the money may have been misapplied by Mr. Wm. Langmead.

There is therefore, as it seems to me, no possible view in which the decision of the Master of the Rolls can be justly complained of.

* BRANDON v. BRANDON.

* 365

1856. May 3. July 30, 31. August 5. Before the Lord Chancellor Lord CRANWORTH.

Leave granted on an *ex parte* application to present a petition of rehearing.¹

In a case of manifest error in a Master's report on which a decree, affecting funds still in Court, was founded, a rehearing was granted after a lapse of thirty years.²

A purchaser of *choses in action* for value without notice is in the same position as his vendor who had notice.³

THIS was an *ex parte* application by J. Pennington for leave to present a petition of rehearing under the following circumstances. The bill was filed in 1819 for the administration of the estate of Samuel Brandon, the testator in the cause, who died in 1818, intestate as to certain portions of his real and personal estate. In 1822 an inquiry was directed as to who was the heir-at-law of Samuel Brandon, and also as to who were his next of kin. In 1823 the Master found who was the heir-at-law, and that certain persons whom he named, being the brothers and sisters of the deceased, were his next of kin, but omitted to mention his widow, though she had been a party to the suit. By the decree in 1825, confirming the Master's report, it was declared, that the widow

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1476.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1476 and notes; *Turner v. Turner*, 2 De G., M. & G. 31, and cases in n. (1).

³ See *Chitty Contr.* (10th Am. ed.) 138, 139, and notes.

was entitled to dower out of certain parts of her husband's real estate, but it was also declared that the next of kin only as found by the Master were entitled to take under the intestacy. The testator's widow having bequeathed her right and interest in his personal estate, such right and interest were now vested in J. Pennington.

For several years the annual income of S. Brandon's estate was exhausted in the payment of annuities under his will. By the Master's separate report in 1846, and after the death of the annuitants, he found with respect to eight seventy-second parts of the residue of S. Brandon's estate, which by the order of 1825 was declared to belong to the next of kin certified to be such under the

report of 1823, that the testator's widow was one of the parties

* 366 entitled to a distributive share under the statute. * He

also found that the shares of several of the next of kin were vested in J. Glover. An exception was taken by J. Glover to the report of 1846, on the ground that the widow's name was omitted in the finding of 1823, and the Master was directed to review his report; but nothing further was done, and a considerable fund still remained in Court.

It was in evidence that in 1840 the assignee in bankruptcy of the heir estimated his share in the personal estate of the testator on the footing of letting in the widow, and that in 1843 the share of the heir was sold to the person from whom J. Glover bought, saving the widow's rights.

Mr. Baily and *Mr. Hardy* now applied *ex parte* for leave to present a petition of rehearing, with a view to rectifying the error in the decree of 1825, and in support of the application referred to *Onslow's Case*, (a) *Bulwer v. Astley*. (b)

The Lord Chancellor said, that, as nothing had been finally done in the case and the fund remained in Court, he thought it would be wrong to make a technical rule interfere with the proper administration of the fund, and that he should therefore grant the application.

(a) 3 P. W. 8, *in notis*.

(b) 1 Phil. 422.

July 30.

The petition of rehearing having been accordingly presented, a motion was now made on behalf of J. Glover, the purchaser of the shares of the next of kin, that the petition of rehearing might be taken off the file.

Mr. Swanston, Mr. Glasse, and Mr. Cracknall, in support of the motion. — * We submit, first, that there is no error * 367 on the face of the decree, and that in analogy to the practice with respect to bills of review, this Court will not allow a rehearing after the lapse of so many years. *Edwards v. Carrol*, (a) *Smith v. Clay*, (b) *Sherrington v. Smith*, (c) *Hovenden v. Lord Annesley*, (d) *Cusack v. Gilbert*, (e) *Lytton v. Lytton*, (g) *Scarisbrick v. Skelmersdale*, (h) *Murtagh v. Tisdall*, (i) *Kelly v. Lennon*. (k)

2d. The order ought not to have been obtained *ex parte*, but upon petition with notice, in order that the Court may determine after being satisfied of the justice and expediency of allowing a rehearing under the 6th order of August, 1852. *Gwynne v. Edwards*, (l) *Storrs v. Benbow*. (m)

3d. It must be presumed that after the lapse of such a time the widow's rights were brought up; but at all events as against J. Glover, who is a purchaser for value and without notice, the indulgence which the petition seeks will not be granted, the effect of which will be to take away from him one-half of what he has purchased. *Mills v. Banks*. (n)

Mr. Bolt, Mr. Baily, and Mr. Hardy, contra. — The decretal order of June, 1825, was manifestly a mistake, and all parties were well aware that the widow was included. The Master's report shows that the widow was before the Court, but it was said

(a) 2 Bro. P. C. 98, Tom. ed.

(c) 2 Bro. P. C. 62, Tom. ed.

(b) 3 Bro. C. C. 639, *in notis*.

(d) 2 Sch. & Lef. 607.

(e) 5 Bro. P. C. 465; see p. 471, Tom. ed.

(g) 4 Bro. C. C. 441.

(l) 9 Beav. 22.

(h) 4 Y. & C. 78.

(m) 3 De G., M. & G. 390.

(i) Drury, 250.

(n) 3 P. W. 1, see p. 8.

(k) 1 Jo. & Lat. 305.

that it must be assumed that there was some arrangement
 * 368 whereby the * widow was excluded, but there is no trace
 of any such arrangement, and by her will she expressly
 refers to her rights in the real and personal estate under her
 husband's will and intestacy.

So far from Mr. Glover being a purchaser without notice, he
 must be presumed to have had full notice of the widow's rights,
 inasmuch as his vendor bought expressly subject to such rights.
 We submit that there is no technical rule by which either the
 widow or her representative is estopped from having the error
 in the decree of 1825 set right; that this is matter proper for a
 rehearing, and that there is no error in our mode of procedure *ex*
parte for leave to present a petition for leave to rehear.

[LORD CHANCELLOR. — Ordinarily speaking, I think it would be
 the most convenient mode of proceeding.]

With respect to the supposed analogy to be derived from the
 practice of the Court in not allowing bills of review after the lapse
 of twenty years, there is an obvious distinction between a bill of
 review and a rehearing, for a decree is not operative until en-
 rolled. *Turner v. Turner.* (a)

Mr. Swanston, in reply.

At the conclusion of the argument the Lord Chancellor said he
 would look through the papers before giving judgment, but he was
 satisfied that there was no peremptory rule to prevent this Court
 altering a decree until enrolment.

August 5.

On this day his Lordship said he was of opinion that this
 * 369 was a fit case for a rehearing. Having adverted to * the
 argument, that J. Glover was a purchaser for value without
 notice, he observed that the purchaser of a *chose in action* could
 not be in a better position than his vendor, who was shown by the
 evidence to have been affected with notice of the widow's rights.

(a) 2 De G., M. & G. 28.

With respect to the objection as to lapse of time, his Lordship added, that under the particular circumstances of this case, where the fund was in Court and nothing had been done with respect to its distribution, he did not think that that objection could be sustained. The motion therefore was refused.

HARPER v. MUNDAY.

1856. November 11, 12, 13, 22. Before the Lord Chancellor Lord CRANWORTH.

A testator, possessed of various leasehold estates, some of which were mortgaged and others not, specifically bequeathed the latter to the plaintiff, and the former to other parties; and after making other specific and pecuniary bequests, gave the residue of his personal estate to his wife, and directed his trustees and executors to receive the rents of all his property, and to apply the same in payment of his debts, together with the principal money and interest owing upon the mortgage of his property, and of the legacies and annuities given by his will, until the whole should be fully paid: *Held*, that the bequest of the incumbered leaseholds was not a bequest of the equity of redemption only; that the relative values of all the leaseholds should be ascertained; and that the plaintiff was not entitled to be let into possession before she had contributed her ratable proportion in discharge of all the debts and legacies.

THIS was an appeal by the defendants, Elizabeth Munday and John Walker, the trustees and executors under the will of James Munday, from the decree of Vice-Chancellor STUART on further directions. By the will of James Munday he gave certain chief rents and leasehold messuages to the plaintiff Maria Julia Harper, but declared that his executors should receive the chief rents, together with the rents and profits of the leasehold cottages, during the minority of the plaintiff, and pay a competent part of the same to and for her maintenance and education; and the testator, after giving various specific bequests, and annuities, and pecuniary legacies, gave the residue of his personal estate to his wife, and his will * contained the following provision: "Pro- * 370
vided always, and it is my will and mind, and I do hereby
order and direct that my said trustees and executors shall and do

from and immediately after my decease receive and take the whole of the chief rents payable to me, and the rents, issues, and profits of all and every my lands, messuages, cottages, public-houses, dwelling-houses, and all my freehold and leasehold estates whatsoever, and apply the same in the payment and discharge of all my just debts, funeral expenses, and the charges of the probate of this my will, together with all the principal money and interest owing upon mortgage of my property, and also of all the legacies and annuities given by me in and by this my will, and that they my said trustees and executors shall continue to receive my said chief and other rents and profits until the whole of the said debts and incumbrances shall be fully paid off and discharged; and I direct and declare that none of the devisees or other persons to or in trust, for whom I have hereby given any lands, messuages, buildings, rents, or hereditaments, shall come into possession of the premises to or in trust for them respectively given, or the rents and profits thereof, until the whole of the said debts and incumbrances shall be fully paid off, discharged, and satisfied, any thing herein contained to the contrary notwithstanding."

The testator died in 1842, and Maria Julia Harper attained twenty-one on the 5th February, 1847, and filed the present bill on the 15th March, 1850. The cause came on originally before the Vice-Chancellor PARKER, and on further directions before the Vice-Chancellor STUART, when his Honor declared that the plaintiff was entitled to the immediate possession of the leaseholds as well as to the whole of the rents and profits received in respect of the same since the death of the testator, free from any charge

* 371 in respect of the testator's debts or incumbrances; * and he directed the trustees to pay the costs of the suit. The various other persons beneficially interested under the testator's will were not made parties to the suit.

The trustees now appealed from that decision to the Lord Chancellor.

Mr. Wigram, Mr. Rolt, and Mr. Amphlett, for the appellants. — We submit that the whole scope of the will shows that all the leaseholds were subject to the mortgage and other debts of the testator, and that the plaintiff, as the specific legatee of certain of the leaseholds, is therefore only entitled subject to such liabilities; if the leaseholds were not so liable, the Court ought to have made

a declaration to that effect, but the Vice-Chancellor not only refused to make any such declaration, but has ordered the trustees to pay the costs of the suit, for which, under no state of circumstances, ought they to have been made liable.

Mr. Malins and *Mr. Hobhouse*, for the plaintiff, in support of the Vice-Chancellor's decree, referred to *Anon. (a)* and *Collyer v. Dudley, (b)* and urged that even if the decree were slightly modified, this Court would not interfere with the discretion of the Vice-Chancellor as to costs; and they contended that the present was an appeal for costs only.

Mr. Wigram, in reply, cited *Carter v. Barnadiston, (c)* and *Middleton v. Middleton, (d)* as to the liability of all the leaseholds to contribute to the payment of the mortgages. As to the present being an appeal for costs alone, he submitted * that * 372 the rule was subject to the very exceptions which existed in this case, inasmuch as it involved a question of principle as well as the question out of what particular fund the costs were to be paid, and there being a substantial ground of appeal the question of costs might be incidentally opened. He also referred to *Powell on Devises*, Jarman's ed. p. 67, *Daniel's Chancery Practice*, Vol. II., p. 1366.

THE LORD CHANCELLOR.—I think the general question involved in this case is free from doubt. My difficulty is that my decision is asked behind the backs of parties materially interested, and I cannot dispose of the case without having those parties brought before me in some form or other. I should be sorry to bring them before the Court by a supplemental bill, but I must take care that in dispensing with form I may not be increasing the difficulties. I do not dispute the proposition that one legatee may file a bill for his specific legacy; that is the old doctrine of the Court, and it has been done where it is simply a money legacy, and no question arises between the legatee and other legatees.

My opinion upon the construction of this will is, that the question about the effect of a general charge of debts *simpliciter* does

(a) 4 Mad. 273.

(b) Turn. & R. 421.

(c) 1 P. W. 505.

(d) 15 Beav. 450.

not arise here, because the testator has expressly charged not only his debts upon his real estate, but all his mortgage debts by name. I think it is extremely likely, speculating on what testators generally mean, that he did not know the extent to which he was affecting his property, but that is mere conjecture.

He begins by saying: "I direct all my just debts,
 * 373 * funeral expenses, and charges of probate and execution of my will to be paid by my executors out of my personal estate, and out of the rents of my real estate as hereinafter mentioned." And then in the next page giving one of his leasehold properties, and giving directions to the trustees how they shall dispose of it, he says: "After all my debts, mortgages, and other incumbrances are paid off as hereinafter mentioned," in both cases referring to a subsequent direction. What are his subsequent directions? He says, after giving all his legacies and disposing of what he calls real estates, which were these leasehold chief rents and leasehold houses, "Provided always," &c. [His Lordship here read the clause set out, *ante*, p. 370, and proceeded:] Language cannot be plainer: all his property was to go in payment of not only his debts but of his mortgages. What was then the duty of the trustees? It is quite clear, I think, that until that which was in the nature of a condition precedent was performed, they were not authorized to let anybody into possession of the leaseholds; that until the debts, probate and funeral expenses and incumbrances had been fully paid off and discharged, the trustees ought to retain the rents. I think the testator meant to say that he charged them all upon his leaseholds, which substantially was all the property that he possessed. The other personal estate was almost nothing. He directed his trustees to receive the rents, and not to let anybody into possession till the debts had been paid; I think the result of that was, that although they were not to let anybody into possession till that was done, yet that each estate was meant to contribute ratably, not that the whole interest of the tenant for life was to go in discharge of those incumbrances. He meant it simply as a pressure. "You shall not let anybody
 into possession until all this preliminary trust has been per-
 * 374 formed." *The trustees may not have construed the will rightly; but I agree with *Mr. Wigram* that it would be extremely harsh if they intending to do right, having received and kept an account of the rents and applied them in payment of the

incumbrances, were to be fixed with a liability as for misconduct because they have erroneously construed this will ; that, however, is what the Vice-Chancellor has done, and I cannot go along with him in the view which he has taken. He has ordered the trustees not only to deliver up the possession to the plaintiff of the leaseholds bequeathed to her, but to pay to her the whole of the rents that have been received since the death of the testator in respect of such leaseholds, not charging those rents with any portion of the debts, and still less with any portion of the incumbrances. One of the smallest incumbrances, and debts to a trifling amount, have been paid off. I think you cannot construe the word "debts" so as to confine it merely to personal charges, and whether the testator was personally liable or not is immaterial. The mortgage debts were beyond all doubt incumbrances.

I think that the ultimate mode of settling the rights of these parties will be to ascertain according to the decree of Vice-Chancellor PARKER what is the relative value of the different estates ; then to ascertain the amount of the debts which have been paid, and which may still remain to be paid, including as part of those debts these mortgages, and to apportion that accumulated charge, made up partly of debts which will include funeral and testamentary expenses, and partly of incumbrances and legacies, and to charge a ratable proportion on the plaintiff's interest ; and when that is done, her proportion of those debts will have to be paid out of the sum found to be received by the trustees in respect * of the rents of her es- * 375 tate ; and supposing that fund is more than sufficient, or sufficient to meet her share of the charge, then she may be let into possession. Although this is the construction which I put upon the will, I cannot be certain that the legatees in remainder of the other leasehold estates may not take a different view of the case. They may say, the tenants for life are bound to contribute the whole. On that account, therefore, I feel extreme difficulty in coming to a decision in the absence of those who may question it.

I think the trustees have been erroneously charged with the costs. Their conduct has not been so careful as it ought to have been ; but I cannot regard it as a case in which, in my discretion, I should charge the trustees with costs. The Vice-Chancellor's view of the case might reasonably have led him to the conclusion

he came to on the subject of costs; and if I had taken the same view of the rights of the parties, I might not have arrived at the conclusion that it was a case in which I ought to interfere with the discretion of the Vice-Chancellor; but taking the view which I do of the rights of the parties, it follows, as of course, that I cannot allow the trustees to remain liable to these costs.¹

November 22.

On this day *Mr. Chandless, Mr. Little, Mr. G. M. Giffard, and Mr. Baggallay*, by the desire of the Lord Chancellor, appeared for the other legatees, who were treated as having been made parties by supplemental bill.

The Lord Chancellor expressed himself to the same effect as he had done when the case was last before him, that the testator's debts, including mortgages, were * charged upon all the leaseholds according to their respective values. His Lordship observed that the parties now appearing in the suit for the first time were not to be bound by the accounts already taken, but were to be bound by the construction put upon the will.

WEBB v. KIRBY.

1856. December 5, 6, 24. Before the Lord Chancellor Lord CRANWORTH.

In the particulars of sale of certain leaseholds, the premises were stated to be sold "by order of the executors," they were in fact sold by the administrator *de bonis non* of the testator *durante absentia* of his next of kin. The sale was by auction, and the purchaser paid the usual deposit, but refused to complete on discovering the nature of the vendor's title: *Held*, dismissing a bill for specific performance, that although the effect of the grant during the lifetime of the absent principal would have been perfectly valid, yet inasmuch as the principal might at the time of the sale have been dead, the title was not such as a purchaser was bound to accept, and the deposit, with interest, was ordered to be refunded.²

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1420, 1421.

² See Sugden V. & P. (14th Eng. ed.) 36.

THIS was an appeal by the defendant William Kirby from a decree of the Vice-Chancellor STUART, directing specific performance of an agreement to purchase certain leaseholds from the plaintiff. The defendant had purchased the leaseholds in question at auction. The particulars of sale stating them to be sold "by order of the executors of John Holloway deceased." The sale was, in fact, made by the plaintiff James Alden Webb, to whom letters of administration *cum testamento annexo de bonis non* of the testator had been granted *durante absentia* of Alfred Holloway, who was the next of kin of the testator, and of Louisa Holloway his wife.

The testator died in March, 1820. Louisa Holloway died in February, 1855, and the leaseholds in question then became subject to the trusts for sale under the testator's will, dated the 22d December, 1819. By that will he directed that, at the decease of his wife, his entire property should be sold, and an equal division made of the *proceeds among his children. He *377 also directed that his executors should be at full liberty to make sale of all his disposable property, and to invest the moneys as in his said will expressed, and that their receipts should be full and sufficient discharges to any purchaser or purchasers whatever, and he appointed his wife, and two of his sons, and one of his sons-in-law, executrix and executors of his will. Louisa Holloway survived her three co-executors. Letters of administration *de bonis non* of the testator, with the will annexed, were granted to the plaintiff on the 2d October, 1855, as "the lawful attorney of Alfred Holloway the son, and one of the residuary legatees named in the will of John Holloway," and the same constituted the plaintiff administrator of "the goods, chattels, and credits of the said deceased (with the said will annexed), left unadministered as aforesaid, for the use and benefit of the said Alfred Holloway, now residing at Jordan, Lincoln county, in the province of Canada West, in North America, and until he shall duly apply for and obtain letters of administration, with the said will annexed, of the unadministered goods of the said deceased to be granted to him."

The leaseholds in question were put up to sale by auction on the 6th September, 1855, by the plaintiff's direction, subject to certain conditions of sale, the only material condition being the ninth, which was in the following terms: "The vendor sells under the

will of John Holloway deceased, and the concurrence of the persons beneficially interested in his estate or the purchase-money shall not be required, and the vendor shall only be required to enter into the usual trustees' covenant, that he has done no act to incumber." The defendant having bought the premises, signed the usual memorandum and paid the deposit, but, within the time limited by the conditions of sale, took an objection * 378 that * the plaintiff, as such administrator of the testator, was not in a position to make a good title, without the concurrence of the representative of the last surviving trustee; whereupon the plaintiff obtained letters of administration to the effects of Louisa Holloway, as surviving trustee and executrix of the said testator's will, but inasmuch as Alfred Holloway would, if in England, have been the proper person to administer her estate, the plaintiff was thereby constituted "administrator of the goods, chattels, and credits, of the said deceased, for the use and benefit of the said Alfred Holloway, now residing at Jordan, Lincoln county, in Canada West, and until he shall duly apply for and obtain letters of administration of the goods of the said deceased to be granted to him."

The defendant then objected, that the letters of administration *durante absentia* did not confer upon the plaintiff a right to sell, and he also objected to complete his purchase without the concurrence of the parties beneficially interested.

The Vice-Chancellor having made a decree for the specific performance of the contract, with costs, against the defendant, he now appealed to the Lord Chancellor.

Mr. Bacon and *Mr. Boyle*, for the plaintiff, in support of the Vice-Chancellor's decision. — It was argued in the Court below, as it will be here, that under the Act for the administration of assets in cases where the executor to whom probate has been granted is out of the realm (38 Geo. 3, c. 87), an administrator *durante absentia* stands on the same footing as an administrator *durante minoritate* or *pendente lite*, but there is, in truth, a considerable difference between the first and the two last * 379 species of administration. The * confusion has arisen in calling this an administration under the statute, whereas it is, in truth, wholly irrespective of the statute, and is conferred under an express authority from the absent party. They referred

to *Prince's Case*, (a) *Slater v. May*, (b) *Clarke v. The Earl of Ormonde*, (c) *Anstruther v. Chalmer*, (d) *Ellis v. Deane*, (e) *Walker v. Woollaston*. (g)

Mr. Wigram and *Mr. Rendall*, for the defendant Kirby, in support of the appeal. — We submit that the sale should have been by the trustees, not the executors, and there is no trustee before the Court; and that even if a complete personal representative could sell, the plaintiff cannot make a good title either in his character of administrator *durante absentia de bonis non* of the testator, or of Louisa Holloway his wife, who was the surviving trustee of his will, for his title is only as the attorney of Alfred Holloway, who may be dead, and a valid act cannot be done in the name of a dead man. *Lepard v. Vernon*, (h) *Watson v. King*. (i) It is also to be observed, that the grant of administration is for the use and benefit of a third party, and whenever this restriction occurs, the grant does not authorize a sale of a term of years. *Prince's Case*. (a) That was the case of an administration *minore ætate*, but the cases are analogous, and that of an administration *durante absentia* is the strongest. *Slater v. May*, (b) *Walker v. Woollaston*. (g) Further, the grant is until Alfred Holloway administers, but there is neither allegation nor proof that he has not administered.

* At all events, the point is too doubtful to compel a purchaser to take a title depending on the result. * 380 *Cooke v. Crawford*, (k) *Walker v. Mower*, (l) *Wilson v. Bennett*, (m) *Mortimer v. Ireland*, (n) *Drysdale v. Mace*. (o) The testator being dead upwards of thirty-five years, and the proceeds not being required for the payment of debts, it is clear that even if the plaintiff were the complete personal representative, a purchaser would not be excused from seeing to the application of the purchase-money. There are, moreover, two misrepresentations in the particulars: the first, that the sale is by order of the executors; and the second,

(a) 5 Rep. 29 b.

(b) 2 Ld. Raymond, 1071.

(c) Jac. 108.

(d) 2 Sim. 1.

(e) Beattie, 5.

(g) 2 P. W. 576.

(h) 2 V. & B. 51.

(i) 4 Camp. 272.

(k) 13 Sim. 91.

(l) 16 Beav. 365.

(m) 5 De G. & Sm. 475.

(n) 6 Hare, 196.

(o) 5 De G., M. & G. 103.

that it is under the will, which is quite sufficient to avoid the contract. *Seton v. Mapp*, (a) *Rhodes v. Ibbetson*, (b) *Rainsford v. Taynton*, (c) *Symons v. James*, (d) *Nott v. Riccard*, (e) Sugd. Vend. & Purch. page 843, ed. 11, Sugd. Con. View, page 242.

Mr. Boyle, in reply, cited *Forbes v. Peacock*. (g)

THE LORD CHANCELLOR. — The question in this case is one which does not often arise, and it turns on the legal rather than the equitable effect of letters of administration granted *durante absentia*. I shall not finally dispose of this case till I have looked at the authorities. There are two grants of administration to the plaintiff: one *de bonis non* of the testator, who died in 1820; the other of Louisa Holloway, which describes the plaintiff as * 881 attorney of the testator's * son in Canada, not *durante absentia* simply, but until the son shall duly apply for and obtain letters of administration; this could not be revoked until the son returned.

The first question is, whether the plaintiff can sue in either of these characters.

Had the sale been effected by the executors of the original testator, then the objection, as to the concurrence of the parties entitled to the purchase-money, would have been out of the question; it is otherwise, however, if the executors have done every thing, and the sale has been by the representatives of the surviving trustee; in that case the consent of the *cestuis que trust* would be necessary, unless excluded by the conditions of sale.

I will look over the authorities to which I have been referred, and give my judgment in a few days.

December 24.

The Lord Chancellor, after stating the facts and the terms of the grant of the letters of administration, proceeded: That form was settled upwards of twenty years ago, after some deliberation, by Sir JOHN NICHOLL, *In the Goods of James Cassidy*. (h) Hay-

(a) 2 Coll. 556.

(b) 4 De G., M. & G. 787.

(c) 7 Ves. 460.

(d) 1 Y. & C. C. 487.

(e) 20 Jur. 1038.

(g) 1 Phil. 717.

(h) 4 Hag. Ec. 338.

ing considered the present case, I am of opinion that, although the plaintiff, as administrator *durante absentia*, could make a title (because, if the party for whom he is attorney is alive, he clearly could), yet that it is not such a title as a purchaser would be obliged to accept, for *non constat* that the letters of administration are now in force, as they clearly would not be if the party had died. It is impossible to warrant to the purchaser that the principal is alive. This seems * to me an insuperable objec- * 382
tion. I agree, if the principal were alive after the conveyance was executed, the purchaser would have a valid title, and the purchaser could have maintained an ejectment; but that is not the question. But even if that objection did not exist, still it is not a case for specific performance, inasmuch as the sale is not by order of the executors, but by the administrator *durante absentia* of the party entitled to apply for the grant; and in such a case, in the absence of any specific stipulation to the contrary, the *cestuis que trust* must be parties. The ninth condition of sale was intended to remove the difficulty, but it does not. The sale purported to be by order of the executors. No one purchasing under these conditions would suppose it was a sale by the administrator *durante absentia* of the next of kin of the surviving trustee. If it had been so stated, a purchaser might have declined to have had any thing to do with the title.

I am of opinion, therefore, that the plaintiff has not made out such a title as this Court will compel a purchaser to accept, and the consequence is, that instead of a decree for specific performance, which the Vice-Chancellor has made, there must be a decree for the dismissal of the bill with costs.

The deposit, with interest at four per cent from the 6th September, 1855, to the day of payment, was ordered to be repaid to the defendant.

1857. January 12. Before the Lord Chancellor Lord CRANWORTH.

On motion upon notice under the 3d Order of August 7, 1852 (second series), by a party against whom a decree had been made to enroll the decree after the expiration of six months from the time when the same was made, the burden of showing cause why it should not be enrolled *held* to be on the party in whose favour the decree had been made.²

THIS was the renewal by the defendant of a motion, which had been refused by the Master of the Rolls, for leave to enroll a decree, notwithstanding the expiration of six months, specified in the third Order of the 7th August, 1852 (second series), from the date on which it was pronounced. The decree was made against the defendant on the 29th February, 1856, and drawn up on the 13th June following. The motion before the Master of the Rolls was made on the 22d December. The Order, on the construction of which the question arose, is the following: "In case any party is desirous to enroll a decree, or order, or dismissal after the expiration of six calendar months from the time the same shall have been made, he shall obtain an order for that purpose, and which order, unless made by consent of the adverse party, or on motion and notice to all the parties, shall be a conditional order in the first instance, but shall become absolute without further order unless cause is shown against it within twenty-eight days after service of the order."

The motion was supported by an affidavit, which was not before the Master of the Rolls, to the effect that the plaintiff and defendant had since the Master of the Rolls' decree acted on the assumption that an appeal direct to the House of Lords was to be made, the plaintiff's solicitor having corresponded with the defendant's about a joint appendix, and heading his letters "In the House of Lords."

¹ See 7 H. L. Cas. 750 affirmed.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1020; *Wellesley v. Wellesley*, 3 De G. & J. 164.

Mr. Jessel, in support of the motion, submitted that the party against whom a decree had been made had the right to enroll at any time, and, according to the old practice, enrolment was by an order of course at the Rolls; * that the object of the * 384 new practice was to protect the person in whose favour a decree might be pronounced; that the proper construction of the Order was to substitute the leave of the Court as of course, unless the party in whose favour the decree had been made could show reasonable grounds why the motion should not be granted. He added, that the Master of the Rolls had, in the case of *Sherwin v. Shakespeare*, (a) granted an extension of twenty-eight days after the expiration of the six months for the enrolment of the decree. If wrong on the point of construction, he relied upon the circumstances set forth in the affidavit, which, he contended, showed that the conduct of the plaintiff in opposing the motion amounted to a breach of faith. He cited *Barnes v. Wilson*, (b) *Stevens v. Guppy*. (c)

Mr. R. Palmer and *Mr. Dickenson*, for the plaintiff, *contra*. — The object of the order was to prevent vexatious and unnecessary appeals to the House of Lords.

[THE LORD CHANCELLOR. — That was not the intention.]

We submit that the true construction of the Order is to place the *onus* on the party applying for a relaxation of the rule to show cause why there should be any indulgence. At all events, being an indulgence, it can only be granted on payment of costs. In the present case, the facts relied on in the affidavit were not before the Master of the Rolls, and the result of the Master of the Rolls' decision is not to shut out the defendant from appealing to the House of Lords; it only imposes upon him the obligation of having the cause reheard before the Lords Justices. They urged, that even if the construction of the defendant was a correct one, the enlargement of the time could only be granted as an indulgence and upon payment of costs.

* Without calling for a reply, the Lord Chancellor * 385 said: The only question is one of costs, as there can be

(a) 18 Beav. 527.

(b) Russ. & M. 486.

(c) Turn. & R. 178.

no doubt that the defendant has a right to enroll the decree. [After referring to the circumstances disclosed in the defendant's affidavit, which he observed were uncontradicted, and clearly showed that there was no obstacle to the enrolment, his Lordship proceeded:] I think, moreover, that the defendant ought to have liberty to enroll without payment of costs, because I can discover no grounds for the opposition. That disposes of the question in its integrity. With all deference to the Master of the Rolls, I cannot take the same view as his Honor does with regard to the construction of the Order in question. I think that the language of the Order, showing that one of the modes by which a party desirous of enrolling a decree after the expiration of six months may do so by a conditional order in the first instance, proves that the burden of showing that the enrolment ought not to be allowed is thrown on the party resisting the enrolment. The enrolment of the decree gives it validity, and the party who has obtained the decree cannot be prejudiced by its being enrolled; and I think it would be unjust to impose on the party against whom the decree was pronounced the obligation of appealing to the Lords Justices. Here the party is seeking to obtain a final reversal of that decree by the shortest possible course, and it never could have been intended by the Order now in question that he should be under an obligation of taking an intermediate step by appealing to the Lords Justices. I shall therefore grant leave to enroll the decree without payment of costs, but on the terms that the enrolment shall be made within a fortnight, and the appeal lodged within a fortnight after the meeting of Parliament.

1857. January 16, 17. Before the Lord Chancellor Lord CRANWORTH.

By a marriage settlement in 1802, two several sums of 1000*l.* were to be paid by A., the father of the intended wife, to trustees, for the husband and wife and their children. One of these sums was payable immediately, and the other on the death of A. In 1806 and 1810 respectively, A. advanced two sums of 1000*l.* each to the husband, who signed a receipt for the same on the back of the settlement. In 1817, shortly before the death of A., he settled 5000*l.* on his daughter and her husband and issue, on trusts almost identical

with those of the settlement of 1802, and contemporaneously he made his will, wherein he stated, "Whereas I have advanced to my two sons and to my daughter Jane and her husband, in money, stock, and by other means, in value to a considerable amount, now to prevent any question whether such advancements were meant and intended as loans or gifts, I hereby declare they were gifts, and not loans; and it is my will and intention, that as well what I have already given as what I give by this my will to my said sons and to my daughters Jane and Elizabeth, they shall receive and take in full satisfaction and discharge of all claims and demands upon me in any right or manner whatsoever." Eleven years after the death of the daughter Jane and her husband, the plaintiff, who had married one of their children, filed his bill against the representative of the surviving trustee of the settlement of 1802, claiming his wife's share in the two several sums of 1000*l.* under that settlement: *Held*, dismissing the bill with costs, that, though the trustees might have had no direct defence against the claim, yet that having regard to the provision in A.'s will, and inasmuch as his estate would be ultimately liable, such claim was circuitously barred.

THIS was an appeal by the defendant Mary Chambers from a decree of the Vice-Chancellor STUART, directing her, as the personal representative of William Clutterbuck Chambers, to pay to the plaintiff William Davis one-fifth of two several sums of 1000*l.* The following short statement of the facts of the case, extracted from the Lord Chancellor's judgment, will suffice to render the report intelligible.

The question arose under the trusts of a settlement executed on the 2d January, 1802, upon the marriage of James Chambers with Jane Millington. John Millington, the father of Jane Millington, was at that time alive, and it was agreed that James Chambers was to bring into the settlement certain real estates, in consideration of which John Millington consented to give * James Chambers 1000*l.* for his own benefit, and further * 387 to settle 2000*l.* upon his daughter and her husband and the issue of the marriage, in the ordinary way. The settlement stated that 1000*l.*, part of the 2000*l.*, had been paid to the trustees William Clutterbuck Chambers and John Millington junior, but the other 1000*l.* was not only not stated to have been paid, but was not payable then, being merely a sum of money which Millington the father covenanted that his executors should pay to the trustees at his death, upon the same trusts as the former 1000*l.* John Millington the father died in 1817. There was issue of the marriage eight children, three of whom died without having attained any vested interest under the settlement. Jane Chambers

died in September, 1832, and James Chambers died in December, 1838, when the interest of their five surviving children took effect. One of these children was Mary Jane, and she married the plaintiff William Davis, who filed the present bill in 1854 against Mary Chambers, the personal representative of William Clutterbuck Chambers, asserting his title as husband of Mary Jane Davis (no settlement having been made on his marriage) to one-fifth of the two sums of 1000*l.* each.

It was established by the evidence, that two or three days before the death of John Millington the father he had been attended by Mr. Pitt, who had been his solicitor, and another gentleman, who was then his solicitor, for the purpose of remodelling his will and of settling his worldly affairs. He died two or three days afterwards; and it appeared by the bill of costs that it was then suggested to him, that, inasmuch as provision was being made for his children, it would be the better mode, to escape the burden of the legacy duty, to make a settlement for them instead of giving what

he was about to give by his will; and in order to carry that * 388 intention into * effect he took a bond from Mr. Pitt (to whom he had paid 5000*l.*), conditioned for the payment of 5000*l.*, with an agreement underwritten at the foot of the condition, stating that it was money which Mr. Pitt was to hold for Jane Chambers and her husband and their issue, not precisely on the same trusts for the children as contained in the settlement of January, 1802, but so nearly the same that the difference was unimportant.

Concurrently with those instruments, and by the assistance of the same solicitor, John Millington made his will, by which, after some immaterial bequests, he stated: "Whereas I have advanced to my said son John, and my sons John Howes Millington and William Millington, and to my daughter Jane and her husband, in money, stock, and by other means, in value to a considerable amount, now to prevent any question whether such advancements were meant and intended as loans or gifts, I hereby declare they were gifts and not loans; and it is my will and intention that as well what I have already given, as what I give by this my will, to my said sons John, John Howes Millington, and William Millington, and to my daughters Jane and Elizabeth, they shall receive and take in full satisfaction and discharge of all claims and demands upon me in any right or manner whatsoever."

When the cause was heard before the Vice-Chancellor STUART, his Honor being of opinion that the provision and settlement of the 5000*l.* ought not to be considered as a satisfaction of the plaintiff's right under the previous settlement of January, 1802, declared that the plaintiff was entitled to the payment of one-fifth of the two several sums of 1000*l.*, with interest at 4*l.* per cent from the day of the death of James Chambers, and he ordered the payment to be made by the defendant Mary Chambers as the personal representative of William * Clutterbuck Cham- * 389 bers. From that decree the defendant Mary Chambers now appealed to the Lord Chancellor.

Mr. Malins and *Mr. W. D. Lewis*, for the plaintiff William Davis, in support of the decision of the Vice-Chancellor. — We submit that the settlement of 1817, whereby the settlor gave 5000*l.* to another set of trustees, cannot be construed as a revocation of the sum of 2000*l.*, which, by the settlement made upon the marriage of his daughter in 1802, he had covenanted to pay to the trustees of that first settlement. The object of the second settlement was obviously to make an additional provision for his daughter. The doctrine as to double portions is inapplicable in the present case, where the second disposition is by deed and not by will, as is clearly illustrated in the following remarks of the Master of the Rolls in *Palmer v. Newell* : (a) " Where a person executes a deed by which he gives certain annuities to seven persons, and some time afterwards executes another deed by which he gives certain other annuities to five of those persons, the presumption that one is intended to be in satisfaction or substitution for the other appears to me entirely to fail. Both deeds ought to have their full legal effect, and the settlor must be taken to have been aware of the existence of the first deed when he executed the second."

They also cited *Wood v. Briant*, (b) *Plunkett v. Lewis*, (c) *Lady Edward Thynne v. The Earl of Glengall*, (d) *Wharton v. Earl of Durham*, (e) *Story v. Gape*. (g)

(a) 20 Beav. 82; see p. 40.

(c) 3 Hare, 316.

(b) 2 Atk. 521.

(d) 2 H. L. Cas. 181.

(e) 3 Myl. & K. 472; S. C., 10 Bligh, N. S. 526; 3 Cl. & Fin. 146.

(g) 2 Jur. N. S. 706.

* 390 * *Mr. Cairns* and *Mr. Hetherington*, for the defendant *Mary Chambers*, in support of the appeal. — The facts of this case disclose clear and unequivocal evidence of satisfaction, the question being always one of intention. Here the settlor by his will has demonstrated as plainly as language can speak, that he intended the larger provision by the settlement of 1817 to be taken in lieu of the sums covenanted to be paid under the marriage settlement of 1802; but, even without the aid of the will, the presumption of law is conclusive; for, assuming that the testator was indebted at the time of the settlement of 1817 to the extent of the present demand, the provision under that settlement must be considered as a satisfaction of the debt.

They referred to the following authorities: *Seed v. Bradford*, (a) *Wood v. Briant*, (b) *Chave v. Farrant*, (c) *Hayes v. Garvey*. (d)

Mr. Surrage appeared for *Jane Davis*, but took no part in the argument.

Mr. W. D. Lewis, in reply. — The doctrine of satisfaction applies only in cases when the same individual claims the double portion; here the defendant, who represents a trustee who has never been relieved from his trust, has no right to set up the *jus tertii* in opposition to the plaintiff's claim.

The Lord Chancellor, after stating the facts as above set forth, proceeded: The question is, whether *Mr. Davis* has made
* 391 a title * to the one-fifth part of those two sums of 1000*l.* mentioned in the settlement of 1802, with interest. The case has been argued: first, with reference to the 1000*l.* actually transferred into the names of the trustees at the date of the settlement; and, secondly, as to the 1000*l.* covenanted to be paid by *John Millington's* executors immediately after his death. I will consider these questions in an inverted order; and, first, with respect to the 1000*l.* which *John Millington* covenanted to be paid by his executors to the trustees at his death. As to that 1000*l.* the argument is, not that the trustees are responsible be-

(a) 1 Ves. 501.

(c) 18 Ves. 8.

(b) 2 Atk. 521.

(d) 2 Jo. & Lat. 268.

cause they actually had the money, but that they are responsible because *ex concessis* John Millington died a wealthy man, and that it was the duty of the trustees of the settlement of 1802 to have taken steps to enforce payment of that sum of money, in which duty they failed. I am assuming that the settlor left assets more than sufficient to meet the 1000*l*. The question is, whether the trustees can discharge themselves as to that 1000*l*. by reason of their not having sued John Millington's executors. Upon this part of the case it seems to me to be clear that, if the trustees had sued John Millington's representatives, this Court would have restrained any such action, and for this reason, that it was competent for John Millington, if he chose, to give to his children, or to trustees for them, a larger sum in satisfaction for that 1000*l*. [His Lordship here referred to the facts as proved in the evidence as to the settlement of the 5000*l*. by John Millington in 1817 in favour of his daughter and her issue, upon trusts which, though not identical as those of the settlement of 1802, yet so nearly similar as that their difference was of no importance, and proceeded:]

It was argued, indeed, by *Mr. Lewis* that an appointment might have been made under the latter settlement * which * 392 would have defeated all the right of any person under the prior settlement. Nothing of the sort has arisen, because no appointment was made; but the Court would have no difficulty in finding means out of the larger funds of recouping the person the amount he may have been deprived of, and which was given to him by the former settlement. I take it that this second settlement of 5000*l*. included the 1000*l*. which John Millington's executors were bound to pay at the time of his death. I do not rely upon the doctrine, that if a larger portion be given by a parent to a child it is *prima facie* to be in satisfaction of any debts due to the child.¹ Here it is beyond all possibility of controversy that it was in satisfaction, for *Mr. Millington*, by a deed dated two or three days before his death, settles something much larger than that which he is bound to pay to his child, and for which his executors were liable to be sued. But concurrently with those two deeds, and by the assistance of the same solicitor, he makes his will and gives nothing to his children, except a few household

¹ See 2 Lead. Cas. in Eq. (3d Am. ed.) [327], 571 *et seq.*

goods to one daughter and something else to another. [His Lordship here read the portion of the will above set forth, *ante*, p. 388, and proceeded:] If, after the execution of that will, the trustees of the settlement had taken upon themselves to bring an action against the executors, seeking to recover the sum of 1000*l.*, it would have been wilfully throwing away money, because it is obvious that they would have been estopped by that instrument which was executed concurrently with the will and formed part of the same transaction. So much for the 1000*l.* which was covenanted to be paid and was not paid at the death of John Millington.

As to the other 1000*l.* there is a statement in the settlement that 1000*l.* had been actually paid to the trustees. Now I * 393 agree that that *prima facie* is irresistible evidence * that they received and were responsible for that 1000*l.*, and the circumstance that they signed no receipt will not rebut the probability that they received that 1000*l.*, unless they bring counter evidence to show how the erroneous statement came to be made. The question here will be, whether they do show that they have not received that 1000*l.*, and if so, whether they show that the clause in the will which exempts the trustees from any liability to be sued for that 1000*l.* does not also exonerate them in respect of this other 1000*l.* *Prima facie*, I say it is the strongest possible evidence to show that they had received that 1000*l.* What is there, in the first place, to show that they did not? There is this; it is quite certain that, although it is not at all necessary to have a receipt signed by the trustees, yet it was intended that they should have signed one at the back of the deed, because there is a receipt written for the 1000*l.*, in which are the words "signed by us." They did not sign; only one receipt was indorsed and that was a receipt for 1000*l.* "received by us." It was evidently in contemplation that they should sign a receipt to make the deed appear more perfect and conformable. They never signed that. That is some evidence *valeat quantum* to show that they did not receive it; but there is the other circumstance, which is not immaterial, that, although the receipt purports to be for a sum of money received at the time of the execution of the deed, and then and there paid, it appears that by one at least of the trustees the execution did not then take place,—not until nine days afterwards. The trustee who then executed it, Mr. W. C. Chambers, in an answer which he put in to a bill filed by another member of

the family (he having died in 1850, and the bill being filed before that time), denied that he ever received that 1000*l.* or one shilling of it, and it seems to have been considered by the family that the settlement had been abandoned. Of course they could * not do so, but it certainly indicates that the parties * 394 thought that this settlement was something not to be acted on or regarded. These are circumstances that do lead to the presumption that in fact these trustees never received this money.

I may also observe that the truth of the case might have been arrived at if the plaintiff had thought fit to have instituted proceedings at a time when there was anybody alive who could have explained the original transaction. The two tenants for life were both dead in 1838, and then it was that the interests of these parties accrued. Mrs. Davis was then an infant and married. I do not mean to say she is precluded by lapse of time, but it puts parties thus liable to be called upon in a very difficult position, when those who, when alive, could have thrown light upon the subject are all dead.

These being the circumstances which cast a doubt upon the fact whether or not this 1000*l.* actually was paid to the trustees of the settlement of 1802, let us consider what we have in evidence. I feel the force of the observations of *Mr. Lewis*, that the receipt of money by James Chambers is no proof against those who do not claim in right of him; but as between James Chambers and John Millington, the person of whom the money was received, as far as James Chambers is concerned, such receipts are cogent and irresistible evidence that all the money agreed to be paid under that settlement was paid, not to the trustees, but to James Chambers. James Chambers was entitled to receive 1000*l.*, the trustees another 1000*l.*, and at the death of John Millington another 1000*l.* A receipt was prepared on the deed, intended to be signed by the trustees, because it is "by us received, the day and year within written, of and from the within-named John Millington the elder, the sum of 1000*l.*, being the consideration money within mentioned * to be paid by him to us." That is the only * 395 receipt indorsed; it is not signed by the trustees, but by James Chambers, the intended husband. He was to receive a thousand pounds, and I think the inference irresistible that the 1000*l.* was actually paid to him, and that in all probability he did not observe that the receipt was in form by the trustees. He

signed for the 1000*l.* he was to receive, and no receipt is signed by the trustees. That was in 1802. What happened afterwards? I presume that it was not convenient to Mr. John Millington to advance the 1000*l.* due to the trustees at that time, or at least that it was convenient to him to postpone the payment; and in that I am borne out, seeing that there is another receipt signed on the 2d January, 1806, in the following terms: "Received the further sum of 1000*l.* from the within-named John Millington, with interest on the same to the day of the date. JAMES CHAMBERS." That is irresistible evidence that both these two sums of 1000*l.* had been paid to him and not to the trustees. It is not immaterial to observe, that in December, 1810, four years afterwards, Mr. Millington, being then rich and minded to help his daughter and her husband, chose to pay a further sum of 1000*l.* to the son-in-law James Chambers, meaning thereby, as far as he could, to have got rid of the liability as to the other 1000*l.*, which was not due till after his death; and he not only paid him the 1000*l.*, but he did that which under no provision of the settlement was he liable to do; namely, paid interest from the time of the marriage to the time of the advance, intending it as a gift. [His Lordship here read the receipt of this third thousand pounds and interest, and proceeded:] Join that circumstance with what took place just before the death of John Millington. It may be very true that as between the trustees and the *cestuis que trust* the trustees could not say that this 1000*l.* had ever been paid.

* 396 But when the *cestuis *que trust* called upon the trustees, the trustees would have a right over against John Millington; therefore, although there would be a claim on the part of the *cestuis que trust* against the trustees, yet ultimately the claim would be against John Millington; and it seems to me that, in order to stop all such claims as these, that particular language was introduced into the will, where he says: "Whereas I have advanced to my said son John and my son John Howes Millington, and to my daughter Jane and her husband, in money, stock, and by other means, in value to a considerable amount, now, to prevent any question whether such advancements were meant and intended as loans or gifts, I hereby declare they were gifts and not loans." That quite tallies with the whole of what one sees upon the settlement. He says in effect, "I have made these advances, but I mean them as gifts, and my children are not to be

called upon to be responsible for any of such advances." This also serves to explain the testator's views with regard to the third 1000*l.*, for he was not liable to pay it at that time; but having concurrently with the date of that will settled a sum of money more than double the amount of these two sums of 1000*l.*, namely, 5000*l.*, he proceeds to say, "it is my will and intention that, as well what I have already given as what I give by this my will to my said sons John, John Howes Millington, and William Millington, and to my daughters Jane and Elizabeth, they shall receive and take in full satisfaction and discharge of all claims and demands upon me in any right or manner whatsoever." The argument put forward by the plaintiff's counsel would leave the estate of John Millington liable, without the possibility of an answer, to the trustees as to this sum of money. But when this gentleman by his will says, What I am now doing is in satisfaction of all claims and demands on me, — he must mean all such as might directly or circuitously be made upon him.

* Such being the view which I take of this case, I must * 397 act upon it, though I have the misfortune to differ from the Vice-Chancellor, and this bill must accordingly be dismissed with costs. It is a very ungracious demand when it is considered that this plaintiff's wife has received a sum considerably larger than the 400*l.*, the amount of his claim, upon the express stipulation that it was to bar all claims on the trustees; but inasmuch as the larger sum is alleged to be for her separate use, the plaintiff says it is no benefit for him. If he must have his pound of flesh, he must take it with its consequences.

HOLDEN v. HOLDEN.

HILL v. DOLT.

1857. January 20. Before the Lord Chancellor Lord CRANWORTH.

Under the 39th section of the Act 15 & 16 Vict. c. 86, an order for the production of a witness at the hearing of a cause may be obtained without the order of the Court.¹

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 884.

THIS was the renewal of a motion which had been refused by the Vice-Chancellor STUART for a *subpœna duces tecum*, directing the attendance, with an original document, of an officer of the East India Company at the hearing of the above causes.

The application had originated in consequence of the record and writ clerk having refused to issue the writ without an order to that effect from the Judge of the Court before whom the causes were set down, upon the hearing of which the production of the party was required.

By the 39th section of the Act for the Improvement of the Jurisdiction of Equity (15 & 16 Vict. c. 86), it is enacted, "upon the hearing of any cause depending in the said Court, whether commenced by bill or by claim, the Court, if it shall see fit so * 398 to do, may require the * production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties to the suit or in such manner as it may think fit."

The Vice-Chancellor had declined to make the order, on the ground that no application to the Court was required, and that the writ issued *ex debito justitiæ*.

Mr. W. Morris, in support of the application.

The Lord Chancellor, after referring to the language of the 39th section, was at first inclined to think that the construction put on it by the record and writ clerk was correct, but at a subsequent period of the day his Lordship intimated to the parties his concurrence with the opinion of the Vice-Chancellor, to the effect that no special application to the Court was necessary for the issue of the writ.

* SNEESBY v. THORNE.

* 399

1855. July 12, 13. Before the LORDS JUSTICES.

One of two executors, erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate. *Held*, that the purchaser could not enforce a specific performance of the contract.¹ Whether he could have done so if the executor had been under no misapprehension, *quære*.

THIS was an appeal from the dismissal by Vice-Chancellor WOOD of a bill for specific performance filed by a purchaser of a leasehold house.

The agreement in question was dated the 18th of August, 1852, and was expressed to be made between the defendants William Thorne and Joshua Smith, described as executors of the late Thomas Turner, of Sheffield, deceased, of the one part, and the plaintiff Henry Sneesby of the other part, and it was signed by Mr. Smith on behalf of himself and the other defendant. It expressed that the defendants agreed to sell to the plaintiff and that the plaintiff agreed to purchase for 1550*l.*, for the residue of the several terms then unexpired therein, certain leasehold pieces of ground, messuages, and premises in Sheffield Park.

The plaintiff had paid a deposit of 155*l.* to Mr. Chambers, the solicitor of the defendants, who sent to the plaintiff an abstract of the title of the defendants as executors of one Thomas Turner, deceased, of whose estate the property formed part.

The plaintiff accepted the title, was let into possession, and by his bill stated that he had laid out various sums of money in improvements.

The defendants, however, refused to complete on the ground that the contract was entered into by the defendant Joshua Smith without the authority or assent of * the defendant * 400 William Thorne, but under a misapprehension that he had such authority.

The plaintiff then instituted this suit, charging by his bill that, so far as authority or assent might be necessary, the defendant

¹ See Sugden V. & P. (14th Eng. ed.) 216, 668; Lewin Trusts (5th Eng. ed.), 313, 353, 354.

Joshua Smith acted as the authorized agent of the defendant William Thorne, and that Mr. Chambers, the solicitor, acted as the authorized agent of both the defendants. The bill also charged that the defendant William Thorne, who had chiefly resided in America since the decease of Thomas Turner, left his co-executor Joshua Smith to manage the affairs of their deceased testator.

The prayer was that the defendants might be decreed specifically to perform the contract on their part, and to assign the premises to the plaintiff, or that it might be declared that the defendant Joshua Smith was alone competent to perform the same, and that he might be decreed specifically to perform the same on his part, and to assign the premises to the plaintiff.

It appeared from the answers and evidence that the defendant Smith had let the property without consulting his co-executor, and that in April, 1851, Thorne, who was then living in Dorsetshire, wrote to Smith expressing his regret that the house had been let, as it might prejudice the sale, and stating that he was decidedly in favour of selling the property, being satisfied in his own mind that this course would be for the best.

It also appeared that in May, 1851, Thorne went to Canada, but not with the intention of permanently residing there, and that early in 1852, Mr. Smith instructed Mr. Chambers to sell the property; that an unsuccessful attempt to do so was made,
 * 401 and the result communicated * to Mr. Thorne in Canada, who, on the 21st of September, 1852, wrote respecting the sale as follows: "You certainly should have written to me before offering it for sale. I am glad it is not disposed of, and all had better remain as it is until my return."

In the mean time, however, the contract in question had been entered into.

The defendant Thorne returned to England in January, 1853, and refused to concur in the sale.

The Vice-Chancellor in his judgment referred to *Mortlock v. Buller* (a) and *Sainsbury v. Jones* (b) as establishing that the Court will not enforce, as against a person selling in a fiduciary character, a contract which any party interested in the trust is entitled to complain of; and, considering the present contract one of

(a) 10 Ves. 292.

(b) 2 Beav. 462; 5 Myl. & Cr. 1.

that description, his Honor dismissed the bill with costs as against the defendant Thorne, and without costs as against the defendant Smith.

Mr. Rolt and *Mr. J. T. Humphrey*, for the plaintiff, in support of the appeal. — One executor has authority to sell without the concurrence of his co-executor, and therefore the defendant Smith has power and ought to be compelled to perform the contract. *Simpson v. Gutteridge*, (a) *Cole v. Miles*. (b)

Mr. Chandless and *Mr. Bagshawe, Jr.*, for the defendant Thorne, and *Mr. Daniel* and *Mr. C. Barber*, for the defendant Smith, were stopped by the Court.

* THE LORD JUSTICE KNIGHT BRUCE. — I will assume for * 402 the purposes of this argument (without, however, intending to decide), that the purchase-money was a sufficient price for the property comprised in the contract in question; that its terms were proper; and that Mr. Smith had, at the time when he signed the contract, full power and authority to enter, without the concurrence of his co-executor, into a contract effectual at law and in equity for the sale of the property at a sufficient price and on proper terms. Still, in the circumstances of this case, it would have been a rough proceeding to exercise that power in the absence of necessity or pressure, neither of which has been shown to have existed; and I am of opinion, that Mr. Smith never intended to exercise such a power by entering into the contract independently of his co-executor. The form of the contract and the circumstances satisfy me that Smith, when he signed the contract, considered that he had Mr. Thorne's concurrence, and would not have signed it if he had believed that Mr. Thorne would not sanction his act. Thorne had not, in fact, given authority to enter into the contract, and has refused to adopt it. It is, therefore, inoperative as against him personally. To enforce it against Smith and the testator's estate, would be to enforce a contract different from that into which Smith intended to enter.

And it appears to me more consistent with the principles on which the Court acts in suits of this nature, to leave the plaintiff

(a) 1 Madd. 609.

(b) 10 Hare, 179.

to his remedy at law than to decree specific performance. The appeal must be dismissed.

THE LORD JUSTICE TURNER. — It is plain that Smith would * 403 never have entered into * this contract, had he not supposed that Thorne would ratify it. A decree for specific performance would, therefore, place him in a position in which he never intended to place himself.

I am, moreover, not satisfied as to the price paid, nor is it clear to me that, if a specific performance were decreed, Smith would not be liable for a *devastavit*. Under these circumstances specific performance ought not, I think, to be decreed.

I give no opinion on the general question, whether specific performance of a contract for sale by one executor apart from his co-executor could be decreed; it will be time enough to decide that point when it arises.

Appeal dismissed with costs as to the defendant Thorne, and without costs as to the defendant Smith.

NAYLOR v. WRIGHT.

1857. January 17. Before the Lord Chancellor Lord CRANWORTH.

An application, under the 7th of the General Orders of August, 1852, to amend a printed bill, partly by printed and partly by written alterations, refused.¹

In this case Mr. R. W. E. Forster applied for leave to amend a printed bill by introducing amendments amounting to more than two folios in one place; and as that could not be done in writing, it was proposed to introduce such new matter by reprinting the two first pages of the bill, and by making a few other consequential alterations in writing. He referred to the 7th Order of the General Orders of August, 1852, and to the 8th section of the Act for the Improvement of the Jurisdiction of Equity (15 & 16 Vict. c. 86).

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 422, n. (3).

The Lord Chancellor refused the application, * observing * 404 that the rules of the Court had been made after the most careful deliberation, and with reference to the general convenience of the suitor, and that it was not expedient to alter rules so framed, merely for the purpose of saving a little extra expense.

ARCHER v. HARRISON.

1857. January 17, 19. Before the Lord Chancellor Lord CRANWORTH.

The trustees of a benefit building society, acting on the rules of the society, declared a bonus of 23*l.* per share, calculating the amount in forgetfulness as they alleged of the decision in *Fleming v. Self*, 3 De G., M. & G. 997, and therefore on the assumption that advanced members, that is members who had borrowed money of and executed mortgages to the society, would not be entitled on redeeming those mortgages to any thing on account of bonuses. A. B., an advanced member, then gave notice of his desire to redeem: *Held*, that he was entitled to have credit for the bonus of 23*l.* on each of his shares, and that the Court would not interfere to relieve the society from the consequences of the act of the trustees.¹

THE defendants in this case were the trustees of "The Free Trade Investment Association," a society established in accordance with the provisions of the Act for the regulation of Benefit Building Societies (6 & 7 Will. 4, c. 32). The plaintiff was a holder of thirty-six shares in the association, and had received advances on his shares and mortgaged them to the association to secure such advances, thus being what, for the sake of distinction, may be termed an advanced member or a borrower. He subsequently became desirous to redeem, and some questions being raised as to the terms on which he was to be allowed to do so, he gave a formal notice in writing dated the 21st August, 1855.

It appeared that bonuses of different amounts had from time to time been declared by the society, and that at the annual meeting of the society held in March, 1855, a bonus of 23*l.* per share was declared under and by virtue of the rules of the society. The

¹ See *Fleming v. Self*, 3 De G., M. & G. 997, and cases cited in n. (1); *Smith v. Pilkinton*, 1 De G., F. & J. 120.

defendants alleged that the bonus was declared upon the assumption and under the belief that borrowers or advanced * 405 members, * who might have received their shares or any portion thereof under the said rules, were not entitled on redeeming their mortgages to any thing on account of the bonuses from time to time declared. The decision, however, pronounced by the Lord Chancellor in the case of *Fleming v. Self*, (a) in December, 1854, had settled that a party in the position of the plaintiff was, on redeeming, entitled to credit for the amount of bonus payable at the date of the notice to withdrawing members. The plaintiff, therefore, claimed to be entitled to credit for the bonus of 23*l.* on the shares held by him on redeeming his securities. The defendants resisted this claim, and the plaintiff filed his bill to enforce it against the society.

The cause came on to be heard before Vice-Chancellor STUART on the 18th November, 1856, and his Honor, considering the case to be precisely similar to that of *Fleming v. Self*, (a) made a decree accordingly, giving to the plaintiff the benefit of the * 406 bonus. (b) * From this decision the defendants appealed, not disputing the plaintiff's right to redeem, but only objecting to the manner in which the account was directed to be taken.

(a) 3 De G., M. & G. 997.

(b) The decree of the Vice-Chancellor directed an account to be taken of all subscriptions, redemption-moneys, and other payments which, upon the 21st August, 1855, were due, owing, and payable by the plaintiff, as a member of the society, to the defendants, as the trustees of the society, in respect of the plaintiff's thirty-six shares in the society, under and by virtue of the several indentures in the bill mentioned, and the rules and regulations of the society therein also mentioned: and in taking the account the longest period during which the society could possibly last, having regard to its net assets and to the amount of monthly subscriptions and redemption-moneys then still continuing payable, and to the number of shares in the society then to be provided for, should be calculated, and the plaintiff was to be charged with all subscriptions and redemption-moneys which would, on the 21st August, 1855, become due and payable by him, assuming the society to endure for the whole of that period, such money to be treated as a debt then presently due from him. It declared that the plaintiff was entitled, on the said 21st August, 1855, to the same share of profits or bonus in respect of his thirty-six shares as at that time was allowed by the society or the directors thereof to withdrawing members. It directed a reference to tax the plaintiff his costs of the suit, including the account thereby directed, and that in taking this account the plaintiff should be credited with the sum of 23*l.* on each of the said shares, being the amount of bonus payable to the withdrawing members on the 21st

Mr. Malins and *Mr. Hardy*, for the plaintiff, supported the decision of the Vice-Chancellor.

Mr. Bacon and *Mr. T. H. Terrell*, for the defendants. — They assumed the principle, laid down in *Fleming v. Self*, (a) to apply to the present case, and did not draw any distinction from any difference of wording of the rules of the two societies, but they submitted that the calculation of the bonus being wrong, the Court would relieve against it. They stated that the result of giving the relief prayed would be to prolong the continuance of the society, and to fix a very heavy liability on the investing members. They urged that the bonus, instead of being 23*l.*, ought, if rightly calculated, to have not been more than 7*l.*, and that it was not right that the plaintiff should have the benefit of this error. They * added, that in *Fleming v. Self*, (a) no question of this * 407 kind had arisen, the parties having no dispute on the subject.

The Lord Chancellor, without calling for a reply, said: I have no doubt upon this case. The suit was properly framed, and if all the members had been parties, it would have made no difference. The point in dispute was with reference to the amount of bonus, and the only question was, what had the parties stipulated for? This was quite clear, according to the terms agreed on by the managers. These terms were not what an actuary, taking a view of the present position of the society, would pronounce proper; they were not the terms which, perhaps, ought to be adopted, but they were the terms on which the bonus had been settled. The managers now said that the bonus was not that which it ought to have been, that the calculation was wrong. The remedy, however, for this was one which the managers had in their own hands. It was not by coming to the Court of Chan-

August, 1855, and also with the amount of the costs so directed to be taxed. It ordered the plaintiff to pay to the defendants, as trustees of the society, what, if any thing, should be certified to be due to them for such subscription, redemption-moneys, and other payments, after deducting the bonuses and costs, within one month after the chief clerk should have made his certificate, at such time and place as should be thereby appointed. The decree contained other directions applicable to the particular facts of the case; and gave liberty to the parties to apply.

(a) 3 De G., M. & G. 997.

cery ; but the managers must meet and say, that they had made a mistake, and that withdrawing members for the future must have a less bonus ; this was the only remedy. The directors were, by the rules, empowered to allow to withdrawing members such bonus as they should from time to time determine, and in March, 1855, the directors had fixed 23*l.* as the bonus. In doing this, it is alleged, that they had made a mistake, but they have made it with the decision of *Fleming v. Self* (a) before them, and they were bound by what they had done. The present plaintiff then gave his notice to redeem. The managers may have made an erroneous calculation of the bonus, but the Court could not relieve them from the consequence of such an error.

* 408 * The way the error would operate would be this : it would lengthen the time during which the society must last. The chief clerk would have to calculate the utmost time that the society could possibly last, having regard to its assets, &c., and all demands and charges upon the assets would come into the calculation. It was not disputed that several members had received the bonus of 23*l.* The case was governed by the decision in *Fleming v. Self*, (a) and the Vice-Chancellor's decree was right, and there was no reason why the appeal should not be dismissed, and with costs.

His Lordship added, that this case would be a good lesson to directors of these societies to meet at once and see whether they had not calculated the money to be paid to withdrawing members at too high a rate.

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* PENNY v. ALLEN.

1857. January 14, 17, 19. Before the Lord Chancellor Lord CRANWORTH.

A testator who was entitled to the equity of redemption in certain freehold premises subject to a mortgage in fee devised the premises to J. P. and another as trustees, on trust in the first place out of the rents to pay off the mortgage, and he then gave 10*l.* a year out of the rents in the events which happened to E. P. and the remainder of the rents to J. P. and T. M. P. equally, and after the death of E. P. he devised certain parts of the premises to J. P. and the heirs of his body. T. M. P. died in the lifetime of E. P. ;

(a) 3 De G., M. & G. 997.

J. P. then joined in suffering a recovery for the purpose of barring the estate tail, but neither E. P. nor the next of kin of T. M. P. joined in making the tenant to the *præcipe*: *Held*, that the concurrence of E. P. was not necessary, but that the concurrence of the next of kin of T. M. P. was necessary, and that the recovery was for want of such concurrence invalid as to one moiety of the premises.¹

The eldest son and heir of T. M. P. was in possession of the rents of all the devised premises and joined in respect of certain parts of them, of which he was himself tenant in tail, in making the tenant to the *præcipe*. The Court refused, in the absence of any other circumstances tending to prove it, to presume a surrender to him of T. M. P.'s estate *pour autre vie*, or to regard him as having a title to it by general occupancy.²

Held, that there could be no general occupancy whether the estate *pour autre vie* was regarded as legal or equitable; and that the person beneficially entitled, and not the executor or administrator of T. M. P., was the proper person to concur in making the tenant to the *præcipe*.

The title of the plaintiff, against which in this case the recovery was set up, accrued in 1837; the plaintiff brought an ejectment in 1852, but was forced to abandon it and to proceed in equity: he filed his bill in 1855: *Held*, that he was not barred of his title to relief by lapse of time, and in particular that the 23d section of the Act 3 & 4 Will. 4, c. 27 did not apply to the case.

The account of rents and profits of those portions of the property to which the plaintiff was declared entitled was directed from 1852, the time when the plaintiff first made an adverse claim by commencing the ejectment.³

THE bill in this suit was filed in March, 1855, and it prayed a declaration that the plaintiff, J. Penny, was entitled, as tenant in tail in possession under the will of Edmund Penny, the testator in the cause, to certain messuages, lands, and hereditaments thereby devised after the decease of the testator's last surviving child to the plaintiff's father and to the heirs of his body: it also prayed a conveyance by the defendants to the plaintiff and to the heirs of his body accordingly, and an account and payment of what was due to the plaintiff for past rents and profits.

The title of the plaintiff to the relief *thus sought depended *410 upon the validity of a common recovery suffered as hereafter mentioned; and to determine this point the suit was instituted. The following are the facts of the case, and as to which no dispute existed between the parties.

Edmund Penny, of Evercreech, in the county of Somerset, by

¹ See Lewin Trusts (5th Eng. ed.), 495.

² See Lewin Trusts (5th Eng. ed.), 184.

³ See Lewin Trusts (5th Eng. ed.), 642.

his will dated the 22d October, 1796, gave, devised, and bequeathed unto Robert Penny of Stratton and James Penny his grandson (whom he appointed trustees and executors of that his will), and the survivor of them, and the executors and administrators of such survivor, all his freehold estate, lands, and tenements situate at Stratton and then in the tenure or occupation of Mr. Alexander Clarke, upon trust and for the use and purposes therein and hereinafter mentioned, that is to say: First his will was, that the trustees and the survivor of them, and the executors and administrators of such survivor, should let his said freehold estate, lands, and tenements to the best advantage and for the most money they could; and as soon as the yearly rents and profits should come to their hands, they should pay or cause to be paid, first deducting such sum or sums of money as they should lay out in necessary repairs, unto Mr. Abraham Cox of Stratton, his, the testator's, mortgagee, or to his executors, administrators, or assigns, the money due on such mortgage, and after the whole mortgage together with the interest should be fully paid, the testator gave, devised, and bequeathed the rents and profits of his said freehold estate, lands, and tenements, after deducting for necessary repairs as above said, unto his five children William Penny, Mary Clavey, Edmund Penny, Robert Penny, and James Penny, to be equally divided between them share and share alike, or to the survivor of them if more than one, share and share alike; and after

* 411 the decease of the first four of his children, * be they which they might, that then the surviving child should have only 10l. a year neat money of the said yearly rents or profits, which should be paid to him or her quarterly. Also he gave, devised, and bequeathed the overplus of the yearly rents or profits arising above the said 10l. a year (which such surviving child was to have) unto his grandson James Penny, his trustee, and Thomas Merchant Penny, son of his, the testator's, son Robert Penny, to be equally divided between them share and share alike. And from and after the decease of the surviving or last child, he gave, devised, and bequeathed his said freehold estate, lands, and tenements as follows: First he gave and devised and bequeathed unto his said trustee and grandchild James Penny, and the heirs of his body, one piece of pasture ground lying up the rocks containing by estimation about two acres, also his old house and orchard and paddock of ground adjoining the same, and also a paddock of

ground lying in front of the said Mr. Abraham Cox's new built house, together with one other paddock of ground called Straton Hill; but if the said James Penny should die without issue lawfully begotten, then the said testator gave, devised, and bequeathed all the premises above named to his brother John Penny and the heirs of his body. The testator also gave, devised, and bequeathed unto the said Thomas Merchant Penny, and the heirs of his body, his new house and the old house situated at the east end of the same, with the small garden adjoining, and also the paddock of ground called Two Acres adjoining to the limekiln, also two other pieces or paddocks of pasture ground called Ringwell's, situated near Mill House; but if the said Thomas Merchant Penny should die without issue lawfully begotten, then he gave, devised, and bequeathed the same premises to the above-named John Penny and the heirs of his body.

* The testator died on the 19th April, 1797, leaving his * 412 five children, and also his grandsons James Penny and Thomas Merchant Penny, him surviving. The will was proved by James Penny alone, and the other trustee and executor Robert Penny died in 1814. At the testator's death the mortgage mentioned in his will was still subsisting, and the legal estate in all the hereditaments mentioned in his will was then vested in fee in the mortgagee; but in or about the year 1813 the legal estate in the said hereditaments was conveyed to and vested in one William Hyatt, his heirs and assigns, subject to redemption on payment of the moneys secured by the mortgage.

Previously to the year 1827 four of the testator's children, namely, William Penny, Mary Clavey, Robert Penny, and James Penny, had died, leaving their brother Edmund Penny, and also their nephews James Penny, the grandson, and Thomas Merchant Penny them surviving, and thereupon Edmund Penny became entitled to receive out of the rents and profits of the said hereditaments the rent-charge or sum of 10*l.* per annum during his life, and James Penny the grandson and Thomas Merchant Penny became entitled to the residue of the rents and profits in equal shares during the life of Edmund Penny their uncle. Thomas Merchant Penny died in May, 1827, intestate, leaving James Penny, called for the sake of distinction James Penny the younger, his eldest and first son him surviving, and no letters of adminis-

tration to the personal estate of Thomas Merchant Penny were ever obtained either by the said James Penny, his son, or any other person.

Under these circumstances the transaction took place which gave rise to the question now brought before the Court, and which related to those parts of the testator's property which were
* 413 devised after the death (in the *events which had happened) of Edmund Penny to James Penny the grandson and the heirs of his body.

By indentures of lease and release, dated the 28th and 29th November, 1827, James Penny the grandson and James Penny the younger, who was described as being then in possession of the rents and profits, conveyed all the hereditaments devised by the will to William Coles and George Rogers in trust for sale.

By indentures of lease and release dated the 4th and 5th December, 1828, the release being made between the said William Hyatt of the first part, the said William Coles and George Rogers of the second part, James Penny the grandson of the third part, James Penny the younger of the fourth part, Edward Thomas Whitaker of the fifth part, and John Alexander Withers of the sixth part, and by means of a common recovery suffered in or as of Hilary term, 1829, the same hereditaments were conveyed to the said William Hyatt, his heirs, and assigns, in order to confirm his said mortgage security; and subject thereto to confirm the right of the said Edmund Penny, and his assigns, to the said yearly rent-charge of 10*l.*, and all remedies for enforcing the payment thereof; and subject thereto to the uses and upon the trusts declared concerning the said premises by the said indentures of the 28th and 29th November, 1827.

By indentures of lease and release dated the 23d and 24th March, 1829, the release being made between the said William Hyatt of the first part, Edmund Penny of the second part, the said William Coles and George Rogers of the third part, James Penny the grandson of the fourth part, James Penny the younger of the fifth part, the said James Allen of the sixth part, and Joseph Hyatt of the seventh part, after reciting that the said mortgage had been satisfied to the said Joseph Hyatt, and
* 414 that it *had been agreed to invest a sufficient sum to pay Edmund Penny the annuity of 10*l.* per annum in satisfac-

tion of the said rent-charge, the hereditaments devised by the will of the testator were conveyed to the use of the said James Allen, his appointees, heirs, and assigns for ever.

James Allen (who died in the year 1841) by his will, dated the 7th December, 1841, gave and devised unto his wife the defendant Theophila Allen (whom he appointed executrix, and who duly proved his will), and her assigns, for her life, all his messuages, lands, tenements, hereditaments, and real estate wheresoever situate; and after her decease, he gave and devised the same in the shares and manner therein mentioned to the other defendants, who therefore, with the said T. Allen, claimed to be entitled to the hereditaments in question under and by virtue of the said conveyance and will.

James Penny the grandson died in February, 1837, leaving the plaintiff his eldest and first son him surviving.

The plaintiff, as tenant in tail of the property devised to his father as before mentioned, except so far as his title was affected by the recovery suffered in 1829, did not by his bill dispute the fact of the execution of the indenture or of the will; but, with reference to the recovery, he charged, that in order that such recovery should have effectually barred the tenancy in tail of James Penny the grandson in the hereditaments devised to him in tail, it was necessary that Edmund Penny, who was living at the time of the recovery, and also that the legal personal representative of Thomas Merchant Penny, who was then dead, should have joined and concurred in making a tenant to the *præcipe* in such recovery. The plaintiff also charged, that the rent-charge or sum of 10*l.* per annum constituted such an estate and interest in Edmund Penny as to render his concurrence *essential to the * 415 validity of the recovery, and, with respect to Thomas Merchant Penny, that, during the life of Edmund Penny, T. M. Penny was entitled to an equitable freehold estate or interest in one undivided moiety of all the hereditaments devised by the will of the testator, subject to the rent-charge of 10*l.* per annum, and that such freehold estate or interest did not unite, merge in, or coalesce with his tenancy in tail in certain specific portions of the same hereditaments by the will limited to him in remainder after the death of Edmund Penny, and that such freehold estate and interest in T. M. Penny during the life of Edmund Penny, upon the death of

T. M. Penny passed to and vested in the legal personal representative of T. M. Penny according to the statute in that case made and provided, and that under such circumstances the recovery was wholly or partially inoperative, and that the tenancy in tail of James Penny the grandson in the lands and hereditaments so devised to him in tail, or at all events in one equal undivided moiety thereof, had descended upon and was then vested in the plaintiff as his heir in tail. (a)

The defendants insisted on the validity of the recovery, and in particular that it was unnecessary for Edmund Penny to join in the recovery, because he was only entitled to the rent-charge or sum of 10*l.* per annum out of the estate or the rents and profits thereof; and that it was unnecessary for any legal personal representative of T. M. Penny to join in the recovery, because
 * 416 immediately upon his death the hereditaments by the * will devised to him in tail vested in James Penny the younger as his heir in tail.

It may here be mentioned that James Allen in his lifetime, from some period in or after the year 1837, and the defendant Theophila Allen ever since his death, had been in the receipt of the rents and profits of the hereditaments in question.

It also appeared that in the year 1852 the plaintiff commenced proceedings at law for the recovery of the property, but it had been found impossible to prosecute them with effect by reason of the legal estate being vested in the defendant, and the present suit was in consequence instituted.

The case was heard by Vice-Chancellor STUART in June, 1856, when his Honor dismissed the bill with costs, and from this decision the present appeal was brought by the plaintiff.

Mr. Malins and *Mr. Hardy*, for the plaintiff, in support of the appeal. — We submit that the recovery was invalid as to a moiety of the property, inasmuch as no person joined to represent the estate of T. M. Penny. This would clearly have been so, if the

(a) The point of the invalidity of the recovery as to the whole of the hereditaments, on the ground that Edmund Penny had not joined, was abandoned at the bar, and the argument before the Lord Chancellor was confined to the question of invalidity as to a moiety, by reason of no legal personal representative of T. M. Penny having joined or concurred.

limitations had been legal, and the circumstance that they were equitable made really no difference. If T. M. Penny had been tenant for his own life, his concurrence if living would have been needful, but his interest would have ceased with his death; being, however, tenant *pour autre vie*, his interest did not cease on his death, but vested in his representatives. James Penny the grandson could therefore convey no more than one moiety of the property, and the right to the other moiety was in the representatives of T. M. Penny, and they ought to have taken out * administration and joined. It had been attempted before * 417 the Vice-Chancellor to meet this objection by referring to the fact that James Penny, the plaintiff's father, was in possession of the rents, by contending that a tenancy *pour autre vie* was open to general occupancy; but though this might be admitted to be the case where the estate was legal and the possession was actually vacant, the argument did not apply to an equitable estate, where the possession was in the trustee. It was necessary that the equitable tenant for life should join in the recovery as much as if the estate were legal: *Brydges v. Brydges*, (a) *Lord Grenville v. Blyth*, (b) and the title to receive the rents was the test as to who was the equitable tenant for life. It had also been argued by the other side, that a surrender of T. M. Penny's interest ought to be presumed, and Cruise on Fines and Recoveries, Vol. II., p. 27, and the cases of *Warren v. Grenville* (c) and *Goodtitle v. Duke of Chandos* (d) there cited, had been referred to, but no case could be shown of a presumed surrender except after a great length of time, certainly not as here within twenty years. *Rowe v. Power*. (e) The 28d section of the Statute 3 & 4 Will. 4, c. 27, had likewise been mentioned as in favour of the case of presumption, but it was clearly inapplicable. Another objection raised to the plaintiff's title was that he was applying too late, but the facts showed that it was not till 1837 that his title accrued. *Doe v. Pike*. (g)

[*Mr. Lee*, as *amicus curiæ*, mentioned in the course of the argument *Slade v. Pattison*, (h) *Edwards v. Champion*. (i)]

(a) 3 Ves. 120.

(b) 16 Ves. 224.

(c) 2 Strange, 1129.

(d) 2 Burr. 1066.

(e) 2 Bos. & Pul. New Rep. 1.

(g) 3 B. & Ad. 788.

(h) 14 Law J. Ch. 51.

(i) 3 De G., M. & G. 202.

* 418 * *Mr. Walker* and *Mr. Berkeley*, for the defendants, supported the decision of the Vice-Chancellor. — The defendants' title ought not to be disturbed after the time that has elapsed, which must be reckoned from 1829, when the recovery was suffered. Reckoning it, however, even from 1837, it was so long a period that the Court still ought not to interfere. The Court was not bound by the twenty years fixed by the Statute of Limitations, but might allow a shorter time to act as a bar: this principle was recognized by the Statute 3 & 4 Will. 4, c. 27; the 23d section of which statute also showed that twenty years' possession under an assurance by a tenant in tail not barring the remainderman might bar him, and therefore *a fortiori* might bar the issue in tail. A surrender also of the life-estate might well be presumed. As to the recovery, all the parties equitably entitled to the estate joined; and even if this were not so, still a title had been acquired by the actual receipt of rents, and nothing had ever been done to defeat the recovery. In support of this view we submit, first, that there could be no abeyance of the freehold; secondly, that the title by general occupancy applied to equitable as well as to legal estates; and thirdly, that the title by general occupancy was not taken away by the Statute of Frauds or the Act 14 Geo. 2, c. 20. We further submit, that, even if administration had been taken out to T. M. Penny, the representative thus constituted would have had no title to the equitable freehold.

They cited *Cholmondeley v. Clinton*, (a) *Lord Grenville v. Blyth*, (b) *Lloyd v. Evelin*, (c) *Preston on Conveyancing*,

* 419 * Vol. I. p. 44; *Coventry on Common Recoveries*, p. 91; *Burton's Compendium*, pl. 785.

The following cases were cited on the construction of the will, for the purpose of showing that T. M. Penny's interest ceased, being a joint tenancy and not a tenancy in common: *Malcolm v. Martin*, (d) *Armstrong v. Eldridge*, (e) *Pearce v. Edmeades*, (g) *Begley v. Cook*, (h) *Tuckerman v. Jefferies* mentioned in *Jarman on Wills*, Vol. II. p. 165, 1st edit.

(a) 2 J. & W. 1; S. C., 4 Bli. 1.

(c) 3 Bro. C. C. 215.

(b) 16 Ves. 224.

(g) 3 Y. & C. 246.

(c) 2 Salk. 568.

(h) 5 Weekly Reporter, 66.

(d) 3 Bro. C. C. 50.

Mr. Malins, in reply.— With regard to the argument which had been used, founded on the 23d section of the 3 & 4 Will. 4, c. 27, the answer was, in the first place, that the Act was not retrospective; see Sugden on the Real Property Statutes, p. 92, § 8; and, further, that it did not apply to the present case. The object of the Act was to bar, not the issue in tail, but the remainder-man; it applied to cases where the issue must be barred, and it directed that those in remainder should likewise be barred; but in the present case, what was done was simply void, and barred no one; the statute proceeded on the assumption of the issue being barred.

The Lord Chancellor, at the conclusion of the argument, expressed his opinion to be, that the section of the Act 3 & 4 Will. 4, c. 27, to which reference had been made, did not apply to the case, though this had not been his Lordship's first impression; that there was nothing in the defendants' argument as to the lapse of time, and that other circumstances than any which appeared * in the present case must concur in order to war- * 420 rant the Court to presume a surrender. His Lordship observed, that there must be a natural desire to support a transaction concluded so long ago as that now brought in question; he would, however, finally dispose of the case in a few days.

January 17.

The Lord Chancellor stated the will of Edmund Penny the testator, and remarked in passing, that the testator having only an equity of redemption, subject to a mortgage in fee, it was immaterial to discuss whether the terms of the devise to the trustees would or would not have covered the fee if he had been seised of the legal estate, though his Lordship was clearly of opinion that they would. His Lordship then noticed generally the other facts of the case down to and including the death of T. M. Penny in May, 1827, and then proceeded as follows:—

At that time the interests of the parties were thus: Edmund Penny was entitled to 10*l.* a year, James Penny the grandson was entitled to one moiety of the surplus rents, and the other moiety had belonged to Thomas Merchant Penny. He, however, having died as just mentioned, the question arises to whom did

his moiety belong. No special occupancy was designated, and it therefore belonged to somebody during the life of Edmund Penny. In January, 1833, Edmund Penny died, and then the ultimate devise of the estate took effect. Upon that occasion James Penny the grandson became tenant in tail in possession of the estate, but he did not enter upon and enjoy it, because previously to that time he had, in the manner I will advert to presently, * 421 conveyed * all his estate and interest to the person under whom the defendants claim. In 1837 James Penny the grandson died, leaving the plaintiff his eldest son, who claims the property as heir in tail, and the estates being equitable, he has filed his bill in this Court within twenty years after the decease of his father; and he is no doubt entitled, unless it can be shown that the interest of his father was validly transferred to the person through whom the defendants claim.

It is alleged that the estate of the plaintiff's father, James Penny the grandson, was validly transferred by virtue of a recovery suffered by him in Hilary term, 1829; and this would be the case, if there was, according to the law which then existed, a good tenant to the *præcipe*. It is said that a good tenant to the *præcipe* was made by the indentures of lease and release of the 4th and 5th December, 1828, and the question is whether they conveyed an equitable freehold in the whole of the premises comprised in them. As to one moiety, namely that covered by the life-estate of James Penny the grandson, there is no doubt, and as to the other moiety it was contended that James Penny, the son of T. M. Penny, had such an estate of equitable freehold as he could convey to make a tenant to the *præcipe*. The first ground relied upon to make out this was, that it might be presumed that a surrender had been made to him of the tenancy *pour autre vie*. I, however, must say that I concur in the observations which were made in answer to that suggestion. The argument is, that such a conveyance is necessary in order to make a good tenant to the *præcipe*, but there would be an end to this argument if you might always presume the conveyance to be made. The real point is, was there a surrender or not; and though I think that the Court would struggle very much to find circumstances to enable * 422 it to come to * a conclusion that there was, I can discover nothing in the present case to lead to that conclusion. The

recitals in the deed which I have looked at show that the parties themselves had no idea of a surrender, and tend therefore to exclude the notion that any such surrender was ever made.

It was then said, that although a surrender might not be presumed, yet James Penny, the son of T. M. Penny, had a title as general occupant, because no administration was ever taken out to his father, and he was in possession of the rents. It was urged that if this had been a legal interest, James Penny having got into possession would have had a title as general occupant, and that the same doctrine must prevail as to an equitable estate. Now although I incline to go the full length of the modern doctrine established finally by the House of Lords in *Cholmondeley v. Clinton*, (a) that in questions of disseisin, &c., relating to equitable estates, the rules of law must be followed,¹ and to agree that convenience fully justifies the Court in strictly adhering to these rules, yet I think that, with regard to an estate by occupancy, it cannot prevail. Title by occupancy depends upon the fact of taking and continuing in the actual possession of that to which no one else has by law a title, but any such idea is excluded by the fact that the trustee is of necessity in possession. I have not been able to find an exact authority on this subject, but there is an authority that appears to me to go singularly near to it, and in fact to be one from which I should not be warranted in departing. In modern times trust estates are extremely analogous to uses before the Statute of Uses (I do not say they are always exactly the same), and it is quite clear and was decided that there could not be a title by occupancy to a use before the Statute of Uses. The case of * *Castle v. Dod*, (b) I will not say decided it, for it is * 423 there rather assumed, and Comyn, in his Digest, tit. Estates by Grant (F. 2), treats it as established law. The report of the case of *Castle v. Dod* runs thus: "Upon a special verdict the case was, that A., tenant for life, granted by fine his estate to B., and by indenture limited the use to B. for the life of A. and B.; and if he died, living A., that it should remain to C. Afterward B. died, living A. C. entered and let to D. for years and died, living A. Whether the lessee should retain this as an occupant, living A., or that A. should have it again (because no other use is limited

(a) 4 Bli. 1.

(b) 3 Cro. Jac. 200.

¹ See Lewin Trusts (5th Eng. ed.), 514-516.

after the death of C. by reason of his ancient use) was the question. It was adjudged after argument that C. should have it as an occupant, and his lessee should hold it as an occupant, and that A. had not any residue of the use in him: for although where tenant in fee makes a deed of feoffment, and limits the use for life or in tail and doth not speak of the residue, it shall be to the feoffor or conusor, because he had the ancient use in him in fee; yet when tenant for life or he who hath a particular estate grants his estate by fine, and limits the use for years or for a particular time, it shall not return to him, but be to the conusee, although the fine were without any consideration, because he who hath the particular estate by fine is subject to the ancient rent and forfeiture, which is a sufficient consideration to convey the estate to him. And although it was objected that at the common law there was not any occupant of an use, and this statute (the Statute of Uses, 27 Hen. 8, c. 10) hath vested the possession in such manner and nature as the use was, *ergo*, there shall not be an occupant of a possession vested to an use. Coke said: This statute is intended that the land shall have the same qualities as the use had, viz., if the use

was a conditional estate in the land it shall be conditional,
 * 424 but it shall not have the collateral * qualities as the use hath; for there shall be a tenancy by the curtesy of such an estate vested and it shall be assets; and by the same reason there may be an occupancy; for the use and land are now incorporated and of one nature." It was thus treated as clear law that there could not have been occupancy of a use before the statute; and although the language of the statute might seem to have given to the use, when vested, the same qualities that attach to it before it was vested, yet Lord COKE says that does not mean that collateral incidents to the estate are to be the same, and he gives, as instances, tenancy by the curtesy and by occupancy. There was in that case a title by occupancy, because the Statute of Uses had made the use the possession, but it was not disputed, that before the statute there could not have been occupancy; and I think that doctrine must apply to the case of a trust afterwards. I have stated this: but in my opinion the question does not arise here, because I do not think that even if this was a legal estate, there could be a title by occupancy.

It has been assumed that since the Statute of Frauds, until administration was taken out, there might be a title by occupancy;

but I do not conceive that to be at all a correct view of the law. Title by occupancy is a rightful, an indefeasible title, just as much as a title by feoffment, fine, or recovery, and the occupancy being *ipso facto* a tenancy *pour autre vie* would be an estate of freehold incapable of being subsequently defeated. Here, however, the executor or administrator might defeat the title, and would then by construction of law have been in from the death of the former tenant *pour autre vie*, assuming that no valid title could be acquired to his prejudice. Again, supposing since the statute the case of a tenant *pour autre vie* to him and his heirs, and he dies without an heir, but leaves his wife *enceinte*, who afterwards gives birth

* to a child; a person entering before the birth would not * 425 be a tenant *pour autre vie* by occupancy. So in the case of a stranger entering upon glebe land after the death of the incumbent, and before the new parson has been instituted or inducted; he is not tenant by occupancy. A person entering in any of these cases may have acquired an estate by wrong, but he is a wrongdoer, which an occupant is not, and an estate by wrong can never be an estate *pour autre vie*. His title (if any) is a title to the fee by wrong, as an abater or an intruder; it may be an estate capable of being defeated by some person who has a right; but he has no title to the freehold *pour autre vie*. In my opinion, therefore, the equitable question does not arise, because I do not think that there would have been an estate by occupancy even if it had been a legal estate.

There is another view of the case to which I think it right to advert, and it is to some extent material. I agree with *Mr. Walker* that if the administrator or executor had taken out administration and so become tenant *pour autre vie*, he would not have been a person to make a tenant to the *præcipe*. If this had been a question of the legal interest, it might be that, he having the legal interest *pour autre vie* and there being a legal tenancy in tail in remainder, he would have been the proper person; but the estate being equitable, what the Court has to look to is this, who was the beneficial owner of the estate *pour autre vie*, and I think that the person to concur in making the tenant to the *præcipe* was the person beneficially entitled. The persons beneficially entitled here were the next of kin of T. M. Penny, for it may be assumed for the purpose of the present decision, considering the number of years which have elapsed, that there are no debts. Who were the

next of kin, we do not know exactly, but one of them must
 * 426 have been James * Penny the younger, the person who concurred in the recovery, and who is described as the eldest son and heir of T. M. Penny, the tenant *pour autre vie*. The recovery was therefore in my opinion good, not only as to the moiety of which James Penny the grandson was tenant *pour autre vie*, but also as to such a proportion of T. M. Penny's moiety as was represented by James Penny his son.

As to the other point, namely the lapse of time, I think there is nothing in it. Mere lapse of time does not bar in equity any more than at law:¹ it is an ingredient which, with other circumstances, may lead the Court to draw inferences unfavourable to the claim of a party who has let twenty or nearly twenty years elapse without asserting his right. It may in such a case be supposed, that, if he had proceeded earlier, the facts might have been more clearly shown, but there is nothing here to lead to such a supposition.

With regard to the 23d section of the Act 3 & 4 Will. 4, c. 27, I have looked at it very attentively, and I am of opinion that it does not apply, even if it could be construed as having a retrospective operation. The object of the 23d section was to give effect to acts of a tenant in tail against remainder-men and reversioners, and to give effect to assurances, which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder.² There are prior clauses in the statute which show what the operation is as to the issue, and those clauses seem to me studiously worded, so as to be confined only to the case of persons entitled after the expiration of the estate tail. This disposes of all the points.

Having stated my opinion as to the effect of the recovery,
 * 427 what I propose to do is to declare that the * recovery was good as to one moiety, and to direct an inquiry (unless the parties can come to a conclusion without any inquiry, which I think they can do) who were the next of kin of T. M. Penny entitled under the statute to an estate *pour autre vie* in the other moiety, and to declare that the recovery is good as to so much of

¹ See Lewin Trusts (5th Eng. ed.), 630, 631; 1 Dan. Ch. Pr. (4th Am. ed.) 560, n. (1), 639 *et seq.* and notes; Clarke v. Hart, 6 H. L. Cas. 633; Perry Trusts, § 869 and cases cited.

² See Sugden V. & P. (14th Eng. ed.) 483.

this moiety as belonged to James Penny the younger, the son of T. M. Penny, as one of the next of kin: as to the residue of the moiety there must be a decree according to the prayer of the bill.

It was then stated as an admitted fact that T. M. Penny left a widow and five children, the consequence of this being that the plaintiff had succeeded to a considerable extent. A discussion then followed as to the period from which the account of the rents of that portion of the property to which the plaintiff would become entitled should be taken, it being submitted on behalf of the plaintiff that it should be six years previously to the filing of the bill, and on behalf of the defendants that it should be limited to the filing of the bill. The case of *Hicks v. Sallitt* (a) was referred to as a decision in favour of the plaintiff's proposition, but it was remarked in answer that that was the case of an infant, and was expressly treated as an exception from the general rule.

The Lord Chancellor ultimately stated that he would look into the point, and give his decision on a future day.

January 19.

THE LORD CHANCELLOR. — With regard to the point left for determination in this * case, and on which I was re- * 428 ferred to the case of *Hicks v. Sallitt*, (a) I have formed a clear opinion as to what I ought to do.

My impression, if there had been no previous authorities, would have been that the same rule ought to be acted on here as at law, but I do not find that that has been the rule acted upon, and I have no right to be wiser than my predecessors on this subject. The only question as to the time that has occurred to me is between the filing of the bill and the year 1852, when the ejectment was brought; and in my opinion the year 1852 is the period from which I ought, in conformity with the authorities, to direct the account to be taken, because then a decided demand was made, and from that time the persons who were in possession could not say that by the neglect or rather the supineness of the persons who claimed against them they were led to expend their

(a) 3 De G., M. & G. 782.

money. In one of the cases cited in *Hicks v. Sallitt*, (a) namely, *Edwards v. Morgan*, (b) before Chief Baron ALEXANDER, it was pressed on him to give the rents from the time of demanding the estate, and he said, You have no evidence of that time, thus intimating that if the plaintiff could have proved the time he would have directed the amount from that period: here I think that from the time of the ejectment I must treat it as an adverse claim, and that from that time the parties are entitled to an account of the rents.

1857. January 20. Before the Lord Chancellor Lord CRANWORTH.

A. and B. having been bankrupts in 1822, B., the survivor, in 1851, by his will directed his executors and trustees to pay his just debts, including the unpaid in full debts proved under the bankruptcy, and he directed his executors to pay to the official manager of the bankruptcy, or to some authorized person to be appointed by the Court of Chancery, in trust for all the creditors under the commission, so much money as would make the dividend on the estate equal to 20s. in the pound on all the debts so proved: *Held*, that the direction to pay must be regarded as a bounty, not only in favour of those creditors who survived B., but of representatives of those who predeceased him, and that the official assignee of the joint estate was entitled to receive the amount found due to all the creditors, less the amount of legacy duty.¹

THIS was an appeal by the defendants John Martin and George Williamson, the executors of Peter Sowerby the younger, from the decree of Vice-Chancellor STUART, dated the 12th March, 1856, whereby, on an admission of assets by them, his Honor declared that the plaintiff was entitled to have paid to him, as official assignee of Peter Sowerby the elder and Peter Sowerby the younger, so much as should be sufficient to pay the debts proved on their estate, under the commission of bankruptcy, as directed by the will of Peter Sowerby the younger. The defendants also appealed from the Vice-Chancellor's order made on the 19th November,

(a) 3 De G., M. & G. 782.

(b) M'Clel. 541.

¹ See *Lewin Trusts* (5th Eng. ed.), 387, 388; *Sowerby's Trust*, 2 K. & J. 620; 1 *Jarman Wills* (3d Eng. ed.), 315 in note.

1856, on the further hearing, whereby he directed them, within one month after service of the order, to pay the plaintiff the amount found due in respect of the unpaid debts. The circumstances out of which the appeal arose are as follow: On the 13th February, 1822, a *fiat* in bankruptcy was awarded against Peter Sowerby the elder and Peter Sowerby the younger, under which they were declared bankrupts and obtained their certificates. The debts proved under the *fiat* amounted to 5912*l.* 17*s.* 7*d.*, and a dividend of 4*s.* 3*d.* had been paid, leaving 4656*l.* 7*s.* 10*d.*, the amount unpaid of such proved debts.

Peter Sowerby the elder died many years ago. Peter Sowerby the younger, by his will dated the 1st January, * 1851, * 430 after appointing the defendants executors and trustees, and giving them all his personal estate on trust, to pay his funeral expenses, and also all expenses incurred in the execution of his will, proceeded: "And I also direct my just debts to be paid, in which I include the unpaid in full debts proved on the estate of Peter Sowerby the elder and Peter Sowerby the younger, in a commission of bankruptcy issued against the said Peter Sowerby the elder and Peter Sowerby the younger, in February, 1822. Thomas Avison, of Liverpool, was then the solicitor to the commission. I hereby will and direct my aforesaid executors and trustees, within three years from the date of my decease, to pay unto the official manager of the aforesaid bankruptcy estate, or to some authorized person to be appointed by the High Court of Chancery, in trust to pay all the aforesaid creditors who have proved their debts on the aforesaid commission so much money as will make the dividend on the aforesaid estate equal to 20*s.* in the pound on all the debts so proved, no interest thereon to be allowed or paid."

The plaintiff, as the official assignee of the bankrupts' estate, filed his bill on the 27th June, 1855, against the executors, for the payment of the balance remaining unpaid, which the Vice-Chancellor in effect decreed. The plaintiff had also proved the debt in a cause of *Sowerby v. Martin*, which was a suit for the administration of the estate of Peter Sowerby the younger's estate, the decree in which suit was made on the 12th January, 1856.

The defendants, the executors, having appealed from the whole decree, the appeal was opened by —

Mr. Malins and *Mr. Batten*, for the plaintiff, in support
 * 431 of the Vice-Chancellor's decision. — * It is obvious that the
 testator did not intend a mere bounty to such only of the
 creditors of his father and himself as might survive him, but to
 provide for the payment of the debts proved against the joint
 estate; and the bankruptcy having occurred in 1822, and his will
 being made in 1851, the doctrine of lapse is inapplicable.

They relied upon *O'Connor v. Haslam*, (a) *Philips v. Philips*. (b)

Mr. Rolt and *Mr. Bazalgette*, for the defendants, in support of
 the appeal. — There was not only no obligation on the testator to
 discharge these debts, but they were expressly extinguished, the
 remedy, as well as the right, being barred by the Statute 3 & 4 Will. 4,
 c. 42; added to which, the 200th section of the Act 12 & 13 Vict.
 c. 106, makes the certificate of the bankrupt an absolute dis-
 charge; and by the 204th section of the same Act, the debt, once
 barred, cannot be revived by a subsequent promise. If then the
 right is extinguished, it could not form the consideration for a
 new promise, and it follows that the testator has, by his will, con-
 ferred a mere bounty on such of the creditors individually as
 might survive him. *Coppin v. Coppin*, (c) *Williamson v. Naylor*. (d) If the plaintiff's construction is to prevail, there might
 be a competition between the personal representative and the
 assignee in bankruptcy of a deceased creditor. The cases of
Philips v. Philips (b) and *O'Connor v. Haslam* (a) are distin-
 guishable, inasmuch as in the former the will was treated as pro-
 ceeding upon a mixed principle of bounty and obligation; and as
 in the latter, the will was read as directing payment of
 * 432 debts. Under any circumstance, we submit * that legacy
 duty is payable, and that, in this respect, the decree of the
 Vice-Chancellor must be rectified. We further submit, that the
 plaintiff was not justified in prosecuting the present suit, there
 being a decree for the administration of the testator's estate, and
 the mere fact of assets having been admitted can make no differ-
 ence.

(a) 5 H. L. Cas. 170.

(c) 2 P. W. 295.

(b) 3 Hare, 281.

(d) 3 Y. & C. 208.

Without calling for a reply, the Lord Chancellor said: There being an admission of assets, and it not being necessary to take any accounts, I think that the plaintiff was entitled, notwithstanding the decree in the administration summons, to institute this suit. With respect to one point which has been argued in this case, I incline to the opinion that the testator must be regarded as having conferred a mere bounty to the creditors, and that therefore legacy duty has attached and is payable in respect of the sums once owing to the joint creditors of his father and himself. These creditors must be regarded, as they were in the case of *Coppin v. Coppin*, (a) in the light of volunteers, the principle of which decision was recognized by Lord LYNDHURST in *Williamson v. Naylor*. (b) There being a sufficiency of assets, it is quite immaterial, except for the question of the legacy duty, whether these creditors claim as creditors or as legatees. The object of the testator was to do that which was honest and just, namely, to pay those creditors in full who had proved against the joint estate of his father and himself; that object could not have been attained if his intended bounty was to be limited to those creditors only who might happen to survive him, he having lived twenty-nine years after the debts were proved. But assuming that this is not the necessary presumption, yet here the language of * the * 433 will is explicit, for the testator says that his executors are to pay to the official assignee of the aforesaid bankruptcy estate (that was one alternative), "or to some authorized person to be appointed by the High Court of Chancery, in trust to pay all the aforesaid creditors, who have proved their debts on the aforesaid commission, so much money as will make the dividend on the aforesaid estate equal to 20s. in the pound on all the debts so proved." If the estate could not pay 20s. in the pound, it is the plaintiff's duty to distribute whatever he may receive ratably among the creditors and their representatives, and I think that the decree of the Vice-Chancellor, whereby he ordered the amount found due to be transferred to the plaintiff, was substantially right; but my present impression is, that it must be varied in this respect, that the sum to be paid to the plaintiff is the amount found due, less the legacy duty.

(a) 2 P. W. 295.

(b) 3 Y. & C. 208.

Mr. Batten mentioned the case of *Foster v. Ley*, (a) and admitted that, after that decision, he could not dispute that the amounts payable in respect of debts barred by the statute were liable to legacy duty.

The decree was therefore affirmed, with the additional declaration that the amount payable to the plaintiff was subject to legacy duty.

1857. January 23. Before the Lord Chancellor Lord CRANWORTH.

Two suits for the administration of the same estate having been instituted in different branches of the Court, and a decree having been made in the latter of the suits, the proper course for a party wishing to stay proceedings in the other is to get it transferred to the Judge who pronounced the decree, and to make an application in both suits before that Judge.¹

AN application was made to the Lord Chancellor in this case, at the request of Vice-Chancellor KINDERSLEY, to settle the following question of practice which had arisen.

The suit of *Duffort v. Arrowsmith*, attached to the Court of Vice-Chancellor KINDERSLEY, was instituted in July, 1856, for the purpose of carrying out the trusts of the will of the testator in the cause, but no decree had been made in it. Another suit of *Hamilton v. Arrowsmith* was subsequently instituted for apparently the same purpose before Vice-Chancellor STUART, and in it a decree directing the usual inquiries, and appointing a receiver, was made in December, 1856. The defendant in both suits then moved before Vice-Chancellor KINDERSLEY, that the proceedings in *Duffort v. Arrowsmith* might be stayed, and a question arose whether this application ought not to be made to Vice-Chancellor STUART; and Vice-Chancellor KINDERSLEY thereupon requested the parties to mention the matter to the Lord Chancellor.

(a) 2 Bing. N. C. 269.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 70, 398, 798, 799; *Harris v. Gandy*, 1 De G., F. & J. 13; *Swale v. Swale*, 22 Beav. 401.

Mr. Glasbe and *Mr. Amphlett*, for the defendant, and in support of the motion to stay proceedings. — They submitted, that the order to stay could and ought to be made by Vice-Chancellor KINDERSLEY; and that the practice was clearly settled in this way by Lord COTTENHAM in *White v. Johnson*, (a) although the Master of the Rolls, on the authority of *West v. Swinburne*, (b) * had followed a different course in *Ladbroke v. Blea* * 435 *don.* (c) They contended, that the decision in *West v. Swinburne* was clearly wrong, and referred to *Turner v. Dorgan.* (d)

Mr. Anderson, with whom was *Mr. G. W. Collins*, for the plaintiff in *Duffort v. Arrowsmith*. — He submitted that the application ought to be made to that branch of the Court where the decree had been made, and cited *Hawkes v. Barrett.* (e)

The Lord Chancellor, stopping *Mr. Anderson*, observed, that the right thing to do would be to transfer the suit of *Duffort v. Arrowsmith* to Vice-Chancellor STUART, as the Judge by whom one decree had been pronounced, seemed to be the proper authority to prevent another decree being made for the same purpose. His Lordship made an order accordingly, the parties, apparently, not objecting to this course being adopted.

* BROADBENT v. THE IMPERIAL GAS COMPANY.¹ * 436

1856. December 15, 16, 17, 19. 1857. January 17, 22, 29, 31. Before the Lord Chancellor Lord CRANWORTH, assisted by Mr. Justice CROMPTON and Mr. Justice WILLES.

The plaintiff, a market gardener, whose premises adjoined those of a gas company, brought an action against the company for the injury done to his crops, by reason of the noxious matter issuing from the company's works. During the trial of the action the Judge suggested a reference to an arbitrator, who was to determine as to the injury, and as to "what should be done," between the parties. The reference having taken place, the arbitrator made his

(a) 2 Phil. 689.

(d) 12 Sim. 504.

(b) 14 Jur. 360.

(e) 5 Madd. 17.

(c) 15 Beav. 457.

¹ S. C., affirmed, 7 H. L. Cas. 600; 5 Jur. N. S. 1319.

award in respect of the damage sustained up to the date of the award, and no evidence having been adduced before him as to prospective damage, a verdict was entered up for the sum awarded. The company subsequently increased their works: *Held*, that, on a bill filed by the plaintiff, he was entitled to a perpetual injunction to restrain the further manufacture of the gas in a manner injurious to his crops, the award of the arbitrator being, under the circumstances, equivalent to the verdict of a jury.¹

The 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) has reference to cases where a party is injuriously affected by reason of acts authorized to be done by a public company, in pursuance of the provisions of their private Act, and is inapplicable to cases where the injury complained of may (as in the present case under the 29th section of the Gas Clauses Act, 10 & 11 Vict. c. 15) be compensated by recourse to an action at law for damages.²

THIS was an appeal by the defendants, the Imperial Gas Company, from a decision of the Vice-Chancellor Wood granting an injunction to restrain their manufacture of gas under the following circumstances. The short facts are extracted from the Lord Chancellor's judgment.

The bill was filed by J. Broadbent, a market gardener, occupying premises near the works of the Imperial Gas Company at Fulham, and the object of the suit was to restrain the company from manufacturing gas in their retort houses, which adjoin his garden, upon the ground that the manufacture occasioned a very great nuisance to him, and in fact prevented him carrying on his business of a market gardener, either entirely or at least in a mode which enabled him to make the profit which theretofore he * had done by the cultivation particularly of early vegetables, fruit, and flowers. It appeared that the gas company had been established there for many years, and that the plaintiff took this garden in the year 1832 on lease for twenty-one years, which therefore expired in the year 1853. About three years before the expiration of that lease the plaintiff obtained a renewed lease for twenty-one years, to commence from the termination of his former lease, and which would therefore terminate in December, 1874. The gas company manufactured their gas up to the year 1851 in a retort house, which was situated about 240

¹ See *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Ch. Ap. 66.

² See *Grand Junction Canal v. Shugar*, L. R., 6 Ch. Ap. 483, 488, 489; *Oldaker v. Hunt*, 6 De G., M. & G. 376, and cases in n. (2); *Kerr Inj.* 340, 341; *Ware v. Regent's Canal Co.*, 3 De G. & J. 227.

feet from the plaintiff's garden. It was manufactured to a comparatively small extent, but in the year 1851 the gas company built a new retort house very much nearer to the plaintiff's garden, and manufactured gas to a much larger extent than they had been in the habit of previously manufacturing it, and the plaintiff finding, or supposing, that this increased manufacture of gas materially injured the produce of his garden, had it examined by Mr. Way, a skilful chemist; the examination took place in May, 1853, when the opinion of Mr. Way was, that there was material damage arising from the manufacture of the gas. In consequence of that opinion some letters passed between the parties, and in the result the company, thinking that it could not be their gas works which had occasioned the injury, and that they were bound to go on with the manufacture, declined to make any alteration. The consequence was, that an action was brought in 1854 by the plaintiff against the company to recover damages for the nuisance which their works occasioned to him in his business of a market gardener. In the month of June, 1854, the trial came on before the late Lord Chief Justice JERVIS; and on that trial, after the examination of the plaintiff's witnesses, and before the witnesses were examined on behalf of the defendants, the Lord Chief Justice suggested * the expediency of having the case referred * 438 to some gentleman of the bar, who should settle the amount of damage, if any, which had been occasioned, and who should have power to determine " what should be done between the parties." Both parties having consented to a reference, it was accordingly made to Mr. Serjeant CHANNELL, who took great pains, and went more than once on the premises to examine and form an opinion, as well from his own investigation of the state of the garden alleged to have been injured, as by the examination of witnesses. He made his award in January, 1856, and found that damage had accrued up to that time to a considerable extent, which he assessed at a certain sum (the amount is not material), and a verdict was accordingly entered for the amount in the plaintiff's favour. He did not, however, give any direction as to what was to be done prospectively, neither party having asked him to do so. Shortly after the award the company began still further to add to their works, and a third retort house was built. The result was, that the plaintiff filed the present bill against the com-

pany, praying that they might be perpetually restrained from manufacturing gas or coke in any retort house, building, or site nearer his garden than the retort house used by the company previously to 1851, in such manner as to allow the escape of gas or other matter noxious to the vegetation in the plaintiff's premises. The motion for the injunction was made before Vice-Chancellor Wood, and he suggested that it would be more convenient if the parties should at once put the case into a state to be heard upon affidavits to be used as evidence in the cause; and accordingly that suggestion was acceded to. The cause came on to be heard in November last, when his Honor awarded a perpetual injunction in the terms of the prayer, but, in order to give the defendants time to make arrangements, the injunction was not to come into operation * 439 till the * 1st of January. His Honor also suggested that the most reasonable course to take would be that the company should obtain an Act of Parliament, if they could, enabling them to purchase the plaintiff's property, and so put an end to all further discussion.

The defendants now appealed from that decision.

Mr. Selwyn, Mr. Greene, Mr. Jolliffe, and Mr. J. A. Russell, for the plaintiff, in support of the decree of the Vice-Chancellor. — We submit that the injunction which has been awarded was a matter of course, the plaintiff's right having been established at law by the decision of the arbitrator, which is equivalent to a verdict by the jury: *Lee v. Lingard*; (a) but inasmuch as the arbitrator could not deal with the question of prospective damage, it followed that there were only two courses left for the plaintiff in the event of the nuisance not being abated, either to file the bill for an injunction or to have a continual succession of actions at law *toties quoties*. *Walter v. Selfe*, (b) *Soltau v. De Held*, (c) *Haines v. Taylor*. (d)

Mr. Rolt, Mr. Cairns, and Mr. Baggallay, for the defendants, in support of the appeal. — 1st. The plaintiff has not established his right at law. 2d. Even if he had, the present is not a case for

(a) 1 East, 401.

(b) 4 De G. & Sm. 315.

(c) 2 Sim. N. S. 133.

(d) 10 Beav. 75; S. C., 2 Phil. 209.

an injunction. As to the first point, it was never contemplated that the reference to the arbitrator should confer on him the power of stopping the defendants' works; the sole purpose of the reference being to ascertain whether the * defend- * 440 ants' works amounted to a nuisance, and, if so, to estimate the damage, and to determine what should be done once and for all between the parties. The award, therefore, under such circumstances, was clearly not tantamount to the verdict of a jury; but even if it could be so construed, still it is submitted, that, inasmuch as the damage which is assumed to have been occasioned by the defendants' works was the result only of increased production from the authorized works, this is not a case for a perpetual injunction. *The London and North-Western Railway Company v. Bradley*, (a) *The South Staffordshire Railway Company v. Hall*, (b) *The Caledonian Railway Company v. Ogilvy*. (c) It is clearly not a nuisance which in the legal sense of the word is liable to abatement, because it is not a nuisance in respect of which an indictment would lie. *The King v. Davey*, (d) *The King v. Lloyd*. (e) We further submit, that, even after a verdict at law, an injunction will not necessarily be granted, for this Court exercises a wide discretion (not only upon interlocutory applications, but at the hearing) in granting or withholding an injunction. *The Attorney-General v. Nichol*, (g) *Wynstanley v. Lee*, (h) *Elmhirst v. Spencer*. (i) It takes into consideration whether there has been any laches on the part of the plaintiff: *Wood v. Sutcliffe*; (k) the extent and amount of injury sustained, and whether damages at law will afford compensation, and the balance of convenience and inconvenience to the parties from granting or withholding the injunction, the granting of which in this case will deprive a large portion of London of light. *Attorney-General v. The Sheffield Gas Consumers Company*. (l) The Court also considers whether * the right asserted by * 441 the plaintiff is by operation of law or force of contract; in the latter case the discretion of the Court is much more unaffected by the result of a verdict. *Dickenson v. The Grand Junction*

(a) 3 Mac. & G. 336.

(g) 16 Ves. 339.

(b) 3 Mac. & G. 353.

(h) 2 Swans. 333.

(c) 2 Macq. 229.

(i) 2 Mac. & G. 45.

(d) 5 Esp. 218.

(k) 2 Sim. N. S. 163.

(e) 4 Esp. 200.

(l) 3 De G., M. & G. 304.

Canal Company. (a) We consented to the arbitration for the very purpose of avoiding coming into a Court of Equity, and it is monstrous to urge such submission as a reason for obtaining a perpetual injunction against us. It was said that the consequence of refusing the injunction would be, that the plaintiff would be driven to have recourse to a succession of actions at law *toties quoties*, but that is not so, inasmuch as the whole of the Lands Clauses Act (8 Vict. c. 18) is, with certain exceptions, incorporated into the defendants' private Act, and the plaintiff has a clear right to proceed against the company under the 68th section of the Lands Clauses Act, his allegation being that he is injuriously affected by the company's works. *The Queen v. The Eastern Counties Railway Company*, (b) *Glover v. North Staffordshire Railway Company*, (c) *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke*, (d) overruling *The London and North-Western Railway Company v. Smith*. (e) Lastly, we submit that, even assuming a certain amount of injury to accrue from the defendants' works, yet we say that the injunction is not capable of affording complete relief, nor of preventing further litigation; but on the contrary, as the injunction only prevents the defendants from making gas in a manner prejudicial to the plaintiff, the defendants may have recourse to another mode of manufacture which they might contend was innocuous to the plaintiff, and thence would arise interminable litigation as to how far there had been any breach of the injunction.

* 442 **Mr. Selwyn*, in reply, cited *Turner v. Sheffield and Rotherham Railway Company*. (g)

THE LORD CHANCELLOR.—Though I shall not dispose of this appeal without looking more attentively into the affidavits, I may state my present impression on one or two points involved in the case. In the first place the injunction granted by the Vice-Chancellor “restrains the defendants from manufacturing gas in any retort house, building, or site nearer than the retort house used by the defendants previously to the year 1851, in such manner as to allow the escape of any steam, gas, or coke, or other matter nox-

(a) 15 Beav. 260.

(b) 2 Q. B. 347.

(c) 16 Q. B. 912.

(d) 3 Mac. & G. 155.

(e) 1 Mac. & G. 216.

(g) 10 M. & W. 425.

ious to the vegetation in the plaintiff's ground demised by the said lease:" that is, the plaintiff's market garden. The defendants are only restrained from manufacturing gas, in such a mode as to cause the escape of matters noxious to vegetation. The great bulk of the contention before me upon these affidavits is, whether the mode in which they manufacture their gas does cause the noxious matter to be emitted so as to be injurious to the vegetation in the plaintiff's garden. That leads me to repeat an observation I made in the progress of the argument, that this injunction is not very satisfactorily framed, for it leaves every question open just as it was before the motion was made or this case heard; because, if this injunction is continued and the defendants should proceed with the manufacture of gas as they have been doing, exactly the same question might have to be argued again upon a motion to commit their workmen, or to sequester their property, or in some other form in which the plaintiff might choose to complain of the process of manufacture being a breach of the injunction. It would be said on the part of the defendants, we have committed no breach * of the injunction, because * 443 in the amended process of our manufacture we have not caused any gas, steam, or other injurious matter, to be emitted. Looking then at the injunction as restraining the defendants from manufacturing gas in the mode in which they are now manufacturing it, and assuming it to be a mode which is injurious to the plaintiff, the question arises, whether such an injunction is proper. One little fringe of the case, as to the plaintiff being poor and the defendants rich, I need hardly say, has no influence upon me. The plaintiff complains that the defendants are carrying on their business in a way injurious to him. What are the rights which he has in making such a complaint? I take it to be clear, at least according to the old practice of this Court, that a person making such a complaint, being a manufacturer of one commodity, and seeking to restrain the manufacturer of another commodity, who is a neighbour, from going on with his manufacture, because it is a nuisance, is bound first of all to establish that it is a nuisance, by a trial at law;¹ or if he has not done so, this Court will, not

¹ Courts of Equity will not ordinarily take upon themselves to decide the fact that a nuisance exists when that fact is controverted, but will require that the party asking the interference of the Court shall first establish his right at law. *Burnham v. Kempton*, 44 N. H. 78; *Eastman v. Company*, 47 N. H.

necessarily, but in the ordinary course, put the matter in a train of legal inquiry. By reason of the recent alteration, that is not now necessary;¹ but in every case the Court must exercise its discretion. I confess, as at present advised, unless this matter has been so tried at law, as that I am to deem it a satisfactory trial, it appears to me to be a case pre-eminently requiring to be tried at law; that is to say, a trial by the instrumentality of witnesses, examined *vidæ voce* in the presence of practical jurors,² who may come to a conclusion, aye or no, whether the manufacture is as injurious as the plaintiff supposes. There are affidavits without end. There are very high names of professors on the one hand, who say very confidently that the process of making gas is calculated to cause

damage to the market garden; that there are evolved
 * 444, sulphurous acid, free * ammonia, and different chemical products, which they can detect as actually in the bark and on the leaves of the trees in the garden; and they state that such is highly injurious to vegetation. On the other hand, there are names of gentlemen, who, though perhaps not so well known, may be just as scientific as the plaintiff's witnesses, and who say, that although it is true that sulphurous acid and ammonia are evolved, yet that before they come into the open air, they are put in combination with other gases, and that, though it would be literally true to say that sulphurous acid and ammonia are evolved, it is not true to say that they are evolved in the form in which the plaintiff alleges; for they are only evolved in chemical combination with something else, which makes them perfectly harmless. For example, in a piece of common brimstone there would be

71; *Cummings v. Barrett*, 10 Cush. 186; *Attorney-General v. U. K. Elec. Tel. Co.*, 5 L. T. N. S. 328; *Wason v. Sanborn*, 45 N. H. 171; *Syckel v. Emery*, 3 C. E. Green (N. J.), 387; *Ingraham v. Dunnell*, 5 Met. 126; *Perry v. Parker*, 1 Wood. & M. 280; *Kerr Inj.* 217; *Elmhirst v. Spencer*, 2 M'N. & G. 51 n. (3). But if the evidence is satisfactory, the Court will grant an injunction against a nuisance without having the question, whether there is a nuisance, tried before a jury. *Inchbald v. Robinson*, *Inchbald v. Barrington*, L. R. 4 Ch. Ap. 388. See 2 Dan. Ch. Pr. (4th Am. ed.) 1629, n. (3), 1635, n. (1), 1639, n. (4).

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1071, 1072, and notes and cases cited; *Bovill v. Hitchcock*, L. R. 3 Ch. Ap. 417; *Kerr Inj.* 217 *et seq.*; *Fernie v. Young*, L. R. 1 H. L. Cas. 63; S. C., 1 De G., J. & S. 353; *Re Hooper*, 32 L. J. Ch. 55.

² See *Bovill v. Hitchcock*, L. R. 3 Ch. Ap. 417.

plenty of sulphur, no doubt; but it does no harm to any thing. They mean to say that it comes out in a state not capable of causing the injury the plaintiff's witnesses suppose. Then with regard to the other injury, resulting, not from the chemical agency of gases, but from the mechanical operation of coal dust, it is said, that it is a mistake to suppose that that causes any injury; and, in confirmation of that view of the case, reference is made to the state of the gardens of the pitmen near the mouths of the collieries in the north, which produce as fine vegetables and fruit as in any part of the kingdom. I confess, unless I find myself better enabled to come to a conclusion upon the result of this conflicting evidence than I am at present, I should rather not come to a decision without the assistance of a jury. That brings me to the question whether it has been already decided by a jury. In 1854 an action was brought for injuries occasioned by these works, not, perhaps, exactly in the same state, but for all practical purposes nearly in the same state as when the bill was filed. At the trial it was suggested by * the late Lord Chief * 445 Justice JERVIS, with his usual keenness, that it was a most ridiculous action: that if the plaintiff failed there would be an end of it, but that if he succeeded in showing he had sustained some injury, the *quantum* of that being ascertained, neither of the parties would be in a very satisfactory position; that the defendants would again proceed with their manufacture, and there would be another action. And the Chief Justice suggested that it would be much better that some person should take the whole matter in hand, and see whether injury had been occasioned; and if it had, to what amount, not only up to the time of the action brought, but up to the time of the reference; and that he should determine once and for all what should be done between the parties, so that there might be no more litigation. It was said that nothing could be done short of paying the whole value of the land; but the Chief Justice said: "It might be that something much short of that would do; for instance, the expense of removing some of the retorts; it might be that there was some other mode of carrying on the works and of getting rid of the noxious matter which was emitted." The defendants according to the evidence before me, consented to the reference, though they said that they had been prepared with evidence with which they hoped to satisfy the jury that they did not carry on their works in a mode

which caused any injury to the plaintiff. The reference accordingly took place, and the question, instead of being heard before a jury, was heard before Mr. Serjeant CHANNELL, from whose decision there was, of course no appeal; and he found for the plaintiff, that there was damage to the amount of 250*l.* up to the time of bringing the action, and 70*l.* subsequently to the date of the reference; but he proceeded no further; and he did not do that which the defendants say was the inducement to them to consent to the

* 446 reference, namely, * determine what should be done between the parties once for all. That being so, am I to take the finding of the arbitrator as one which ought to satisfy the conscience of the Court as to the truth of the case? With the greatest possible deference for that very learned gentleman, and having no doubt that he looked into the matter with extreme accuracy and attention, I have some doubt whether that is a finding which, according to the rules of this Court, ought to satisfy my conscience in the same way that the finding of a jury would satisfy it. I can see many differences; for example, if there was any mistake made as to the reception of the testimony of the different witnesses by the Judge, or as to the way in which he had directed the jury as to a conclusion upon points of fact, that would be liable to be set right by a Court in banc. All that is lost. It seems that the plaintiff's counsel felt that there was a weakness here, because, if the finding of the arbitrator were conclusive, why did the plaintiff go into any other evidence than to show that the state of things as to the mode of manufacture, which existed at the time of the award, still continued. The arbitrator has decided properly, or he has not. If he has not decided properly, then I doubt whether I can take the imperfect finding of the arbitrator, plus, so to say, the additional affidavits which are before me, as an equivalent to the finding of a jury. That is a question which I must have a little time to consider. Then, again, it would not be fit that I should direct any such trial, or put the matter in the course of legal inquiry at all, unless I were satisfied that, assuming the finding of the jury should be that the plaintiff has been damaged, there is a foundation for the equitable relief here asked in the shape of an injunction. Against that view of the plaintiff's case there are several arguments on the part of the defendants: First, a point not made before the Vice-Chancellor, namely, that the remedy which the plaintiff

* has is neither by an action nor by any application for * 447 an injunction, but by a special application under the provisions of the Lands Clauses Consolidation Act (8 Vict. c. 18). That argument of the defendants is founded upon this position,—that incorporated with their private Act is a provision that the Lands Clauses Consolidation Act, except so much of it as relates exclusively to the purchase and taking of land by compulsion, should form part of it; and they say, that in the Lands Clauses Consolidation Act is a clause enabling any person, whose land is injuriously affected (without being taken) by the works authorized, to claim compensation through the ordinary machinery of summoning a jury under that section, and that that is the remedy to which the plaintiff ought to have had recourse. The plaintiff answers that by saying, in the first place, that portion of the Lands Clauses Consolidation Act is not incorporated with the private Act, because there is the exception of so much of the Lands Clauses Consolidation Act as relates exclusively to the purchase and taking of lands by compulsion, and that the clause in question is found in that group of sections which relates to the taking of lands by compulsion. I do not think that argument is well founded, because if the clause in question does not relate exclusively to the taking of lands by compulsion, whatever might have been the meaning of the legislature, they have in terms said that the Lands Clauses Consolidation Act, except so far as it relates to the taking of lands by compulsion, shall form part of the private Act.¹ But the 68th section of the Lands Clauses Consolidation Act does not relate to the taking of lands by compulsion, although, providing a remedy for persons whose lands are injuriously affected but not taken, it is found, according to the style and fancy of the legislature, inserted among those clauses which relate to the taking of lands by * compulsion. That * 448 surely cannot make the 68th section an enactment relating to the taking of lands by compulsion, when it obviously has reference to no such purpose. But another reason put forward by the plaintiff, to show that the clause in question does not apply, is derived from the Gas Works Clauses Act (10 & 11 Vict. c. 15), which is also incorporated into, and forms part of, the defendants' private Act, which received the royal assent in the

¹ See *Ferrar v. Commissioners of Sewers in the City of London*, L. R. 4 Exch. 227.

month of June, 1854. The plaintiff says, that by the 29th section of the Gas Works Clauses Act there is a provision that nothing in this, or the special Act contained, shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas; and he submits, that that clearly shows that he was not driven to the remedy under the 68th section of the Lands Clauses Consolidation Act; but by the express terms of the Gas Works Clauses Act he might have had the same legal proceedings to which he would have been entitled if the Gas Works Clauses Act had not passed. That is a point which I think requires consideration. It would seem to me, as at present advised, that there are two clauses, by implication, inserted into the Imperial Gas Company's private Act, not altogether reconcilable the one with the other; but the leaning, I confess, of my mind at present is—I consider myself entirely open to change it—that there is the power of applying, under the 68th section of the Lands Clauses Consolidation Act, for compensation. I am not at all moved by the argument, that no sufficient compensation can ever be secured, on the ground that *non constat* when the claim is made it cannot be shown what injury will be sustained prospectively. I do not know that it would be necessary to have that decided once and for all. It may be, if the gas works are carried on in a more injurious way afterwards

* 449 than they are now * carried on, the plaintiff may be able to come again. I do not know how that may be. It would require an attentive consideration of the language of the Act of Parliament before I could come to a conclusion on that subject. But there is a well-known principle of law which would enable the person who was directing the jury—the sheriff—to point out to the jury who were assessing the amount of damages, supposing it were prospective for all damage: there is a well-known principle of law which would enable the sheriff to give a very proper direction, and which would secure to the plaintiff compensation for the utmost possible injury he ever could sustain. [His Lordship here referred to the case of *Armory v. Delamire*, (a) and proceeded.] These being my views, before I finally dispose of the matter, I must look through the evidence, which I incline to

(a) 1 Strange, 504. [1 Smith Lead. Cas. 470 (151).]

think, if it be necessary to have a trial at law, is not altogether *ad rem*. I may, however, come to the conclusion that the trial which has taken place is sufficient to satisfy my conscience, together with the additional evidence since the trial. I am not aware of any case in which the Court has required a trial at law to satisfy its conscience, and then been satisfied with an insufficient trial, backed up by evidence which is to make good that which was in itself insufficient. It may be, that upon further consideration I may bring my mind to the conclusion that such a course is sufficient.

Upon the application of the defendants' counsel, the time when the injunction was to come into operation was extended to the 1st February.

1857. January 17.

On this day the Lord Chancellor said that he had * come * 450 to the conclusion not finally to dispose of the appeal without having the case re-argued on the single point as to whether or not the plaintiff was by virtue of the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) entitled to compensation for all the injury caused by the defendants' works. His Lordship added, that if the plaintiff was so entitled it would, in his opinion, be a conclusive argument against continuing the injunction; but that, inasmuch as it was purely a legal question, he should invite the attendance of two of the common-law Judges, before whom the question would be argued by one counsel a side.

January 22.

His Lordship having requested the attendance of Mr. Justice CROMPTON and Mr. Justice WILLES, those learned Judges now attended.

The Lord Chancellor, on taking his seat, said: For the purpose of the argument I shall assume that the plaintiff is entitled to the relief he seeks by his bill, unless the defendants are able to satisfy me that the plaintiff can obtain all that relief under the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18).

Mr. Wilde, on behalf of the defendants. — By the 4th section of the defendants' private Act, the whole of the Lands Clauses Con-

solidation Act, with the express exception of so much of it as relates exclusively to the purchase or taking of lands by compulsion, is incorporated into the private Act. By the sections of the Lands Clauses Consolidation Act, previous to the 68th, due provision is made for the acquisition of land by agreement and by compulsion, but the 68th section, for the first time, deals with the question of lands, which, though not actually taken by a * 451 company, are injuriously * affected by the company's operations. It will be urged that the 68th section forms one of a set of sections under the heading of "compulsory purchase," but the private Act makes no reference to the headings; it only refers to the subject-matters of the sections in the Lands Clauses Consolidation Act (8 Vict. c. 18), and besides, it is clear that the 68th section of that Act does not relate exclusively to the compulsory purchase of lands. It will also be contended that by the 29th section of the Gas Works Clauses Act (10 Vict. c. 15), which is incorporated into the special Act, the company remains liable to all actions or indictments for nuisance, and that the only remedy against the company under the circumstances is under that section; but while the efficacy of that remedy is admitted, its existence does not abrogate all other remedies.

[The Lord Chancellor observed, that the 68th section of the Lands Clauses Consolidation Act applied only to cases where the damage exceeded 60l.]

That is an additional argument for the co-existence of both remedies. In short, wherever the plaintiff would have a right of action for damage resulting from works before the passing of the Lands Clauses Consolidation Act (8 Vict. c. 18), although his lands might not have been taken, yet his remedy under the 68th section is undoubted. *The Queen v. The Great Northern Railway Company*, (a) *Glover v. The North Staffordshire Railway Company*, (b) *Corrigal v. The London and Blackwall Railway Company*, (c) *The Queen v. The London and North-Western Railway Company*, (d) *The Caledonian Railway Company v. Ogilvy*, (e) *Bradby v. The Southampton Board of Health*, (g) *Re*

(a) 14 Q. B. 25.

(d) 3 Ell. & Bl. 443.

(b) 16 Q. B. 912.

(e) 2 Macq. 229.

(c) 5 Man. & Gr. 219.

(g) 4 Ell. & Bl. 1014.

Byles. (a) It will also be said that *the plaintiff is not *452 injured by "the execution of the works," which will be alleged to import injury resulting only from the building of the retort or manufactory, but that would be giving a very narrow construction to the word "works," which by the interpretation clause of the Lands Clauses Consolidation Act (8 Vict. c. 18) is defined to mean "the work or undertaking which by the special Act shall be authorized to be executed," and by the interpretation clause of the Gas Works Clauses Act, and by the 6th section of the private Act, the expression is, "during the continuance and performance of such works," &c. He also referred to *The London and North-Western Railway Company v. Smith*, (b) *South Staffordshire Railway Company v. Hall*, (c) *The East and West India Docks and Birmingham Junction Company v. Gattke*, (d) *The Sutton Harbour Improvement Company v. Hitchens*, (e) *The London and North-Western Railway Company v. Bradley*. (g)

[THE LORD CHANCELLOR. — I recollect that when the case of *The London and North-Western Railway Company v. Bradley* was before me as Vice-Chancellor, I had some doubts as to whether there was any right of action by reason of the alleged injury to the defendant's beer from the vibration of the railway. The meaning of the word compensation in the 68th section is, I presume, compensation once for all.]

The language in all private Acts with reference to compensation is for "present, permanent, or recurring injury," and the defendants here would be quite ready and willing to be put on any terms for the final settlement of the question. The Lands Clauses Consolidation Act (8 Vict. c. 18) is to be construed liberally, so as to extend the jurisdiction.

* *Mr. Selwyn*, for the plaintiff, *contra*. — Assuming, for *458 the purpose of the argument, that the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) is incorporated into the special Act, nevertheless I submit that the injury com-

(a) 11 Exch. 464.

(d) 3 Mac. & G. 155.

(b) 1 Mac. & G. 216.

(e) 1 De G., M. & G. 161.

(c) 1 Sim. N. S. 373.

(g) 3 Mac. & G. 336; S. C., 6 Railway Cases, 551.

plained of cannot be made the subject of compensation, and therefore that the case is not within the scope of that section. The injury complained of is clearly not authorized by the special Act, because by the 29th section of the Gas Works Clauses Act (10 Vict. c. 15) a right of action is specially reserved in all cases of injury resulting from the manufacture of gas, and it is conceded in the present case that an injury has resulted; and that it has resulted from works not authorized to be made is also conceded, because the plaintiff has recovered at law on the assumption that the act complained of is illegal. Admitting that the Lands Clauses Consolidation Act (8 Vict. c. 18) is to be construed liberally, yet if the 68th section of that Act is to be incorporated into the special Act in accordance with the defendants' construction, it would have the opposite effect, in excluding one of the remedies which the plaintiff has under the Gas Works Clauses Act (10 Vict. c. 15). But the 68th section of the Lands Clauses Consolidation Act is clearly inapplicable to a case of recurring damage, or where, as in the present case, the company is about to do something not authorized by their special Act. Moreover, where the compulsory clauses of the Lands Clauses Consolidation Act are not applicable, an injunction is the only remedy. *Coats v. The Clarence Railway Company*, (a) *Glover v. The North Staffordshire Railway Company*. (b) In short, in order to entitle a party to proceed under the 68th section of the Lands Clauses Consolidation Act, the company must be about to do a legal act, which but for that section would have been actionable. One essential distinction between the present case and those cited by the defendants is, that in the latter the companies had defined limits and powers with reference to the particular lands specified on their plans and sections; whereas in the present case the company are not confined to any locality, but might commence their operations in any part of London; and, to put an extreme case, suppose they had erected works in one of the squares in London, could it be argued that the inhabitants of that square would be remediless, except under the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18)? The result of so holding would be, that the company might be enabled to do that indirectly which it could not do directly; viz., purchase lands compulsorily,

(a) 1 Russ. & M. 181.

(b) 16 Q. B. 928.

Turner v. The Sheffield and Rotherham Railway Company. (a) The defendants admit that there is to be compensation once and for all; but supposing the plaintiff had proceeded under the 68th section of the Lands Clauses Consolidation Act in 1851, how could adequate compensation have been then awarded in respect of the injury which has since augmented threefold? Or, assuming that which the defendants admit, that the right of action remains under the Gas Works Clauses Act (10 Vict. c. 15), is the plaintiff to have recourse to a fresh action *de anno in annum* for every molestation? Again, if, as the defendants contend, the plaintiff were obliged to sell, yet it is to be observed by his lease he has covenanted not to sell, but to cultivate the land in a particular manner till the end of the lease.

Mr. Wilde, in reply. — Whatever is the necessary consequence of acts done under the provisions of an Act of Parliament is legally authorized, and it never could be that the legislature, after conferring statutory powers upon a great company

* like the present, contemplated the right in any individual * 455 to stop the works so authorized. Wherever the Gas Works

Clauses Act (10 Vict. c. 15) and the special Act clash in any particular, the former must give way, but there is in truth no discrepancy between the two Acts, for the 29th section of the Gas Works Clauses Act would be fully satisfied by enacting that the powers of the special Act shall not *per se* excuse the company from an action. The company contends that their acts are lawful and the subject therefore of compensation, and that whatever is not lawful may be the subject of an action under the 29th section of the Gas Works Clauses Act. According to the plaintiff's construction, the remedy under the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) is only confined to injury resulting from the erecting or executing of works; but, according to that construction, if a large embankment were about to be erected close to a house, and which would completely shut out all views from the house, the owner of the house could only seek for compensation during and in respect of the erection of the embankment; and if there was no remedy under the 68th section there would be no remedy at all. The injury may be actionable and still the subject of compensation under the 68th section. The plaintiff

contends that he cannot be called upon to sell his interest in contravention of his covenant, but wherever an injury is inflicted by a company all covenants which are rendered impossible to be performed are made the subject of compensation.

At the conclusion of the argument, the learned Judges desired time to consider their opinion. The period for which the injunction was extended was further extended upon terms.

* 456 * On this day, Mr. Justice WILLES, on behalf of Mr. Justice CROMPTON and himself, delivered the following joint opinion: —

My Lord, — The question was, whether the plaintiff Broadbent can, by proceeding under the 68th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), obtain compensation for all damages done, or which may be done, to his market garden by the increased quantity of gas and smoke issuing from the works of the defendants, the Imperial Gas Company. We are of opinion that he cannot obtain such compensation. It was argued for the defendants, and we think successfully, that the 68th section, so far as it relates to damages occasioned to land not taken, was incorporated in the special Act. We are of that opinion not only because of the use of the word “exclusively” in the incorporating section, but also from the consideration, that if the clause were not thus far incorporated, there would be no compensation given for damages caused by a permanent building or other such work authorized by the special Act. We are, however, of opinion, that no compensation is given by the 68th section, or, generally speaking, by any compensation clause, for matters not made lawful, but which, notwithstanding the statute containing or incorporating the compensation clause, remain wrongful acts, for which the remedy by action is not taken away. We consider it to be an universal rule, applicable to this class of statutes, that statutory compensation is given only for acts authorized by the statute in effect for taking away the right of action of the person injured,¹ and we are of opinion that this is the true construction of the statute before us. If that be so, then inasmuch as it is clear that the 29th sec-

¹ See per CROMPTON J., in *New River Company v. Johnson*, 2 El. & El. 444, 445.

tion of the Gas Works Clauses Act, 1847 (8 Vict. c. 15), modified the powers in the special Act by making the company equally liable to an indictment for nuisance, * or for any * 457 other legal proceeding to which they may be liable in consequence of making or supplying gas, as if the special Act had not passed, it follows that the special Act, not having authorized the injury of which the plaintiff complains, his case is not within the scope of the compensation clause. In confirmation of this construction, it is to be observed, that the compensation mentioned in the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18), so far as relates to the present case, is for land injuriously affected by the execution of the works ; and by section 2 of the same Act, the works shall mean the works of whatever nature which shall by the special Act be authorized to be executed. It was argued for the defendants, that this construction would make the 68th section inoperative. That, however, is not so ; for upon that construction all the Acts taken together will read thus, — “ that the company may make such works as are necessary for the lighting of the specified districts. That the company shall have no privilege or exemption from liability for any thing they may do in making or supplying gas, and that in respect of any injury caused by erecting their permanent works, compensation may be obtained, under the 68th section, as for a matter rendered lawful, but that for damage caused by making or supplying gas to an extent injurious to the public or to individuals, and therefore unauthorized by the Act, the remedy shall be by indictment, or by action.”

We may, by way of illustration, put a case contemplated as possible by the Gas Works Clauses Act, 1847 (10 Vict. c. 15), and in which the compensation clause would be wholly inoperative ; namely, that of a public nuisance caused by making or supplying the gas. In such a case, if the compensation clause was applicable, the company after being compelled to compensate by anticipation all private injuries occasioned or to be * occa- * 458 sioned by the nuisances, would still be liable to indictment, even upon the prosecution of any of the persons so compensated, which is absurd.

If it be necessary to add another reason, we are also of opinion that even if the injury in question were authorized by the special Act ; in other words, if the 29th section of the Gas Works Clauses Act (10 Vict. c. 15) did not exist, the injury could not be said to

have resulted from "the execution of the works" within the meaning of those words in section 68 of the Lands Clauses Consolidation Act. The expression "the works" seems to us more properly to apply to the construction of the manufactory, than to the use of it from day to day, for the purpose of making or supplying gas.¹ If an attempt were made to apply the 68th section to the damage present and future, it would be met by the impossibility of ascertaining at once the amount of the future damage. The amount of damage to be sustained in each future year is not capable of being ascertained either absolutely or within any assignable limits. Even the limit of the damages which might be occasioned by the effect of the greatest quantity of gas which the works can produce being continually made by the company during the remainder of the plaintiff's term, is not fixed. The amount of damage must depend not merely upon the amount of gas produced by the works, but also upon the wind and weather. The damage may, for aught that appears to us, and as more than once has happened in the case of chemical works, be prevented or modified, or even transferred to another district by alteration in the height of chimneys, or by an improved mode of manufacture. The legislature could not, we think, have intended that there should be compensation assessed, once for all, in respect of the future repetition of injuries, of a given nature indeed, but the extent of which, and the

* 459 amount of damages resulting * from them, could only at the present time be, at the best, the subject of a guess.

On the part of the defendants, the cases upon the construction of railway Acts were referred to as favourable to their argument. We, however, take a different view of their effect. We are not aware of any decided case in which a railway company properly executing the powers expressly or impliedly conferred upon them by the special Act, other than and after the making of the permanent works, has been held liable to make statutory compensation under the 68th section of the Lands Clauses Consolidation Act. We are aware that such compensation has occasionally been given by juries, but we are not aware that that course has been sanctioned by any Court in Westminster Hall.

¹ See *Brand v. Hammersmith and City Railw. Co.*, L. R. 1 Q. B. 130, 145, 147, 148, reversed in *Exch. Chamber*, 2 Q. B. 223; *London and North-Western Railw. Co. v. Bradley*, 3 Mac. & G. 336, n. (1); *City of Glasgow Union Railw. Co. v. Hunter*, L. R. 2 H. L., Sc. 78.

The cases relating to railways seem to us to establish, that compensation is given in respect of the calculable damage caused or to be caused in or by the execution of the permanent works of the company authorized by statute, for instance, obstructing ways or injuring lights, — as to when future damage may be assessed, see the judgment of Baron PARKE in *Lee v. Milner*, (a) — that an injurious act, unauthorized by statute, or done by the company negligently in abuse of their statutory powers, is the proper subject of an action;¹ and that any act, other than the erection of the permanent works, if properly done by the company in pursuance of the statute, whatever damage it may cause, is considered sufficiently compensated for by the public benefit expected to follow, and is neither a subject of action nor of compensation.²

Some of the points above discussed were considered in * the recent case of *Lawrence v. The Great Northern Railway Company*. (b) For the above reasons, we answer the principal question in the negative. * 460

January 31.

The Lord Chancellor, having recapitulated the facts as before stated, proceeded: The defendants, being dissatisfied with the judgment of the Vice-Chancellor, have brought the matter, by way of appeal, before me; and, in addition to the arguments urged before the Vice-Chancellor, a ground of objection to the injunction was pressed, which was not mentioned to the Vice-Chancellor, and which indeed had not occurred to anybody till after the judgment was pronounced. That additional argument was that, according to the true construction of the Lands Clauses Consolidation Act (8 Vict. c. 18) this was a case in which, under the 68th section of that Act, the plaintiff was entitled to ask from the company

(a) 2 M. & W. 824.

(b) 16 Q. B. 643.

¹ See *Estabrooks v. Peterborough and Shirley R.R. Co.*, 12 Cush. 224; *Mellen v. Western R.R. Corp.*, 4 Gray, 301; *Rowe v. Granite Bridge*, 21 Pick. 348; *Dodge v. County Comms. of Essex*, 3 Met. 380, 383; *SHAW C. J.* in *Perry v. Worcester*, 6 Gray, 544; *Whitehouse v. Birmingham Canal Co.*, 7 H. & N. 928; *Lawrence v. Fairhaven*, 5 Gray, 110; *Sanford v. The Railway Co.*, 24 Penn. St. 378; *Mohawk and Hudson Railw. Co. v. Artcher*, 6 Paige, 83; 2 Dan. Ch. Pr. (4th Am. ed.) 1650, and notes (1) and (2).

² See *London and North-Western Railw. Co. v. Bradley*, 3 Mac. & G. 396, n. (1) and cases cited; *Brand v. Hammersmith and City Railw. Co.*, L. R. 1 Q. B. 130, 143, 144; *Kerr Inj.* 342.

that which would be a complete indemnification to him ; namely, compensation for all the damage occasioned by these works ; and that, therefore, having the means of protecting himself by means of that clause by which the legislature contemplated a reasonable remedy for persons complaining of the acts of a company incorporated by Act of Parliament, no injunction was necessary. In considering the case, I came to the conclusion that, but for that clause, the plaintiff was certainly entitled to relief.

It was argued before me, as it had been before Vice-Chancellor WOOD, that the plaintiff was not entitled to any relief independently of that clause, upon the ground that this Court is not bound to issue an injunction ; and that in issuing an injunction

* 461 (whether interlocutorily, or, * at the hearing of the cause, perpetually) it will take into account, to some extent at least, the comparative injury that would result to the parties respectively from issuing or withholding the injunction.¹ Now, I gave full attention to this argument, and I considered it as it was going on and afterwards, with a view to satisfy myself as to the state of the law upon that subject, and particularly with reference to the case of *Attorney-General v. The Sheffield Gas Consumers' Company*, (a) in which this Court had acted upon that principle, where clearly a nuisance was perpetrated by the gas company. There the Court refused to interfere by injunction. I have used the expression clearly a nuisance, as the ground of the judgment proceeded upon that assumption, although undoubtedly some members of the Court — myself and, I believe, Lord Justice TURNER — did throw out a doubt whether it could be considered a nuisance,² inasmuch as though the company had no legal authority to take up the soil in order to put their pipes down, yet as they were lawfully constituted a company, and the legislature had contemplated the possibility of such a company existing lawfully without an Act of Parliament, their works, from the nature of things, could not be carried on without taking up the soil of the road or street for a short time ; and we had some doubts, therefore, whether the legislature might not be considered as sanctioning such a use of

(a) 8 De G., M. & G. 304.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1640, and cases cited ; *Attorney-General v. Ely, Haddenham, and Sutton Railw. Co.*, L. R. 6 Eq. 106.

² See *Attorney-General v. Cambridge Consumers' Gas Co.*, L. R. 4 Ch. Ap. 79.

the public highway. Those doubts have since been entirely removed by a decision of the Court of Queen's Bench, upon the trial of that case, when it was determined that there was no authority in anybody, without an express Act of Parliament, to take up or interfere with the pavement of a street or the soil of a road, and that the company, by so doing, were necessarily guilty of a nuisance, and might be proceeded against. But whether that be so or not, it is quite clear * the judgment of this Court * 462 proceeded upon the assumption that there was a nuisance, though it would not interfere by injunction where the evil was so infinitesimal to the persons complaining. In that case the nuisance complained of—the taking up the pavement—was merely a cloak for what was in reality a dispute between two companies, one of which had such authority and the other had not, unless they had it impliedly. The case was not made at all stronger by the fact that, in a subsequent stage, by amendment, it was made a suit at the instance of the Attorney-General, as well as a private suit, because if any person was so advised, he might get a complete remedy by suing at law for damages by reason of the disturbance of the pavement before his house for any appreciable space of time. Now, attending to the principles laid down in that case, I cannot come to the conclusion that there was any thing there decided to warrant this Court in withholding the relief of an injunction to a person seriously and constantly injured by unlawful acts. If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market garden, I have come to the conclusion, that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on. That might be a good ground for the legislature to declare that the company might make gas if they indemnified the plaintiff; but, unless the company had such a right, I think the present is not a case in which this Court can go into the question of convenience or inconvenience, and say where a party is substantially damaged, that he can only be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law; and I quite agree with the Vice-Chancellor, in holding that in such a case this Court must issue an injunction, whatever may be the consequences with regard to the lighting of * the parishes and districts which this company sup- * 463

plies with gas.¹ That being so, a question arose whether there was not under one of the Acts of Parliament (the Lands Clauses Consolidation Act, 8 Vict. c. 18), or the Gas Works Clauses Act (10 Vict. c. 18), a remedy which, though not exactly the same as an injunction, would still be as efficacious and one which might reasonably induce the Court to withhold relief by injunction. I thought that if it could be made out that the plaintiff had the means under the 68th section of the Lands Clauses Consolidation Act of obtaining a complete remedy once and for all, which would satisfy him and put him literally in the position in which he would have been in point of money if no such works had been established, that that would be a reason for withholding the injunction. I have considered the Lands Clauses Consolidation Act, both with reference to the private Act and to the Gas Works Clauses Act. Although I had a strong opinion on the subject, still I thought it right, more particularly as the defendants are connected with the interests of the public, to have the matter decided in the most authoritative way in which the constitution enabled me to have it decided; and with the view of ascertaining the true construction of the 68th section of the Lands Clauses Consolidation Act, I obtained the assistance of the two learned Judges, who, I am afraid somewhat to the inconvenience of the Courts to which they belong, attended during term. But I felt that I could not conveniently postpone the argument till after the term, inasmuch as the injunction was to come into operation the very day after the expiration of the term. The case was very elaborately and fully argued, and Mr. Justice WILLES, two days ago, delivered the opinion of himself and Mr. Justice CROMPTON without any doubt or hesitation, to the effect that the 68th clause of the Lands Clauses

Consolidation Act did not apply for two reasons: first,
 * 464 because the act done by the company * was by the express provision of the 29th section of the Gas Works Clauses Act (10 Vict. c. 15), an unlawful act; for although the defendants were by their own private Act authorized to erect works, and to

¹ Kerr Inj. 346; Attorney-General v. Birmingham, 4 K. & J. 528; Tipping v. St. Helen's Smelting Co., 4 B. & S. 608, 615; Spokes v. Banbury Board of Health, L. R. 1 Eq. 42; Goldsmid v. Tunbridge Wells Improvement Commissioners, L. R. 1 Eq. 161; S. C., 1 Ch. Ap. 349; Raphael v. Thames Valley Railw. Co., L. R. 2 Ch. Ap. 147; Attorney-General v. Mid Kent Railw. Co. and South-Eastern Railw. Co., L. R. 3 Ch. Ap. 100.

do every thing necessary for the supply of gas, yet their private Act was by express enactment to be read as incorporated with the Gas Works Clauses Act, or rather the Gas Works Clauses Act was to be considered as incorporated in the private Act. By the 29th section of the Gas Works Clauses Act, there is an express proviso that nothing in the private Act contained shall authorize the company to make or supply gas in any way so as to cause a nuisance. Therefore, when the company make and supply gas in a mode which would cause a nuisance, the result is that such is not authorized by their private Act; and being an unauthorized Act, the learned Judges came to the conclusion that the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) did not apply, because that Act only gave compensation in cases where the company incorporated was doing an act authorized by their private Act, but which nevertheless caused damage to an individual; as, for instance, if they were to build a retort house where they were authorized, and wholly blocked up the light of a dwelling-house, that would have been an act authorized for the making and supplying of gas, and it would have been an act as to which, but for that clause, there would have been no redress. Other cases might be suggested, but that is sufficient to illustrate the meaning of the learned Judges. But, secondly, they say, that even if there had been no express provision rendering the company liable for the consequences of their acts, and that the 68th section of the Lands Clauses Consolidation Act might apply to legal acts, yet they were of opinion, on grounds which were very ably stated by Mr. Justice WILLES, that it could not apply to a case where it was utterly impossible for the *person seeking *465 reparation to get what would be a reparation. Nothing short of the purchase of the plaintiff's whole interest in the land could by any possibility be represented as being an adequate remedy. He cannot tell how far the process of making gas may, in each particular year, injure his crops. It must be a matter of guess; it cannot be estimated; and to such a case, therefore, the learned Judges thought the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) would not apply. So that if the 29th section of the Gas Works Clauses Act (10 Vict. c. 15) did not exist, and the acts of the company were lawful, I understand the Judges to say — if the plaintiff is to get compensation at all within the 68th section of the Lands Clauses Consolidation Act,

he must come *toties quoties* ; for it is impossible to tell how much he will be damaged during the residue of his lease by the making of gas in whatever quantity it may be made, and by whatever process which, from time to time, the discoveries of mankind may enable it to be made more or less injuriously to the neighbourhood. Now, to that opinion — though of course I am not bound by it — I entirely subscribe. I think, therefore, the case must be considered before me, just as it was before Vice-Chancellor WOOD, as if the Lands Clauses Consolidation Act were out of the question.

There still, however, remains one question to be decided by me, and that is, whether or not I ought to act on the evidence as it at present exists, or whether I ought to put the plaintiff to bring another action ; and upon that point I have had some doubts. I have looked through the affidavits with all the attention I am able to bestow, and my opinion is, that if there had not already been an action, I certainly should have compelled the plaintiff to bring one, in order to have the question tried at law, before I * 466 awarded a perpetual injunction. The *subject is one of extreme difficulty — difficult, perhaps, to any one — certainly pre-eminently difficult to those who, like myself, and probably like most Judges, are little skilled in questions of natural science, and those questions of a cognate nature, which are necessary to be entered into in considering whether or not a particular process of art, productive of smoke, gas, and so on, is or not injurious to neighbouring vegetation. I cannot state it as a proposition of law, that this Court never will or can interfere to restrain a nuisance until it is established by law to be a nuisance ; there may be cases in which it is so clear, that this Court does not want the assistance of a Court of Law.¹ But the present would not have been one of those cases. The ordinary rule is, not to issue an injunction to restrain a nuisance until the existence of the nuisance has been established by a trial at law.² In the present instance, it has been established by a trial at law in this sense, that an action was brought, and instead of proceeding to get the verdict of a jury, the parties agreed to a reference. In the course of the argument, I had a doubt whether that amounted to a decision which it would be proper for me to act upon, as if it had been the decision of a jury ; but, upon full consideration, I think it is. The

¹ See *ante*, 443, n. (1).

² See *ante*, 443, n. (1) and cases cited.

Judge made the suggestion, it was acquiesced in, and it was referred to the arbitration of a learned barrister, who had the assistance of eminent chemists on behalf of the plaintiff and defendants; and he himself very carefully examined the subject. If this had been simply a reference, I cannot but think that I ought to take it as satisfactorily establishing the fact for me to act upon, and more especially as, looking at the conflict of evidence, I confess, that if it were impossible to get the assistance of a jury, and I was bound to decide upon the evidence, I think the preponderance is strongly in favour of the plaintiff. The obnoxious gas, according to the evidence of one side, is combined with other gases which * make it not deleterious; this is denied * 467 by the witnesses on the other side. Who is right in that controversy is a matter upon which I should have found myself utterly incompetent to form an opinion, still less to decide. But there are two or three patent facts upon which, I think, I might decide, and as to which I do not find any controversy. It is in evidence, that 120 tons of coals are consumed every day, and that they pour out dense volumes of smoke which come down upon the vegetables, fruit-trees, and flowers in the plaintiff's garden; and it was said by some of the witnesses, that, upon examination, they found, more particularly as they approached the gas works, the leaves were grimed on their surface with great quantities of smoke.

I do not want chemists or scientific people to tell me that that must be injurious. If it were not so, nature would have provided somehow or other that the supply of this mixture, or something equivalent to it, should always be at hand; it is ridiculous to express a doubt about it. Every one knows that flowers do not flourish in the neighbourhood of London as in the country; and it must be, because in London they are so covered with deposits of soot, which injure vegetation. That of itself would be conclusive to my mind, but beyond this, one of the scientific witnesses deposes (and I do not find it satisfactorily contradicted), that upon taking away a portion of the bark, or some of the other vegetable substances, — trying it first by chemical analysis, and also by an examination with a microscope, — he found crystals, — the results of sulphuric and ammoniacal acid (whether evolved in a combined state or a free state is not material), intervening between the bark and wood of the trees; I should not have believed all the chemists in the world, if they had told me that such was not inju-

rious to vegetation. On this point, therefore, I am strongly
 * 468 in favour of the conclusion at * which the arbitrator and
 the Vice-Chancellor have arrived.

But what led me to doubt about the injunction was, the sugges-
 tion that the learned Chief Justice intended, at the trial, that the
 arbitrator should have power not merely to decide the question as
 to the amount of damage, but to decide what should be done
 between the parties; that is to say, he was to have the power, if
 he thought fit, of saying—the gas works shall be continued as
 usual, but that the company shall purchase the plaintiff's interest;
 or, if not, they should give him a specific sum by way of compen-
 sation once and for all. It was said, that the only reason why
 the company agreed to refer the matter to arbitration was, that
 they considered that it would be a reference to decide the whole
 question between the parties once and for all. Although that
 statement created some little doubt in my mind, yet I cannot say
 that it induces me now to come to the conclusion that there ought
 to be another trial. Were I not satisfied as to what the result of
 the trial ought to have been, I might have come to a different con-
 clusion. No satisfactory reason has been given why, when it was
 open to both parties to make any proposal they thought fit before
 the arbitrator, whether for the purchase of the plaintiff's interest,
 or for compensation, or for having an annual assessment of damage,
 nothing of the sort was suggested. The arbitrator gave ample time,
 and the parties finally left it to him to decide upon what they
 thought were the only necessary materials. They must have
 known, before the award was made, that the arbitrator could not
 then have decided any thing more than the amount of damage
 actually sustained, as they had not given any evidence upon which
 he could have arrived at a conclusion upon any other subject. I

think, therefore, I am bound to take (and I do it satisfac-
 * 469 torily to my * own mind), the conclusion of the arbitrator
 as decisive on the question. I thought at first, that the
 plaintiff, by giving evidence of all that was in truth before the arbi-
 trator with respect to the injury which had accrued previously to
 the award, had gone to an unnecessary length. It is not very
 material, however, to consider whether that was necessary or proper,
 because the plaintiff was bound to show that the same evil had con-
 tinued subsequently to the award, and he does show to my satisfac-
 tion, not only that such is the case, but that it has been an

increasing evil since the works have been extended. That, again, is a circumstance which strongly leads me to the conclusion that the decision was right upon the facts; because, if the works are increased, the great probability is, by every logical process of reasoning, that the evil which has already resulted will continue increasing, as it is alleged to have hitherto done.

Upon the whole, therefore, I come to the conclusion that the decision of the Vice-Chancellor was right; that this injunction was properly issued, and must be continued; and that the appeal, being dismissed, must consequently be dismissed with costs. I shall extend the time, as I intimated, till the 1st of March, upon the undertaking of the company that they will, if that extension occasions any damage to the plaintiff, pay him, by way of compensation, any amount which this Court may direct as reasonable.

* TEMPEST v. TEMPEST.

* 470

1857. March 7, 11. Before the Lord Chancellor Lord CRANWORTH.

A testatrix by her will having given certain specific and pecuniary bequests to her general residuary legatee, and having also given various charitable legacies, directed the latter to be paid in precedence of the other pecuniary legacies out of such part of her personal property not specifically bequeathed as was by law applicable for charitable purposes. The pure personalty being insufficient to pay all the charitable legacies: *Held*, that, in the administration of the testatrix's estate, the debts, and the funeral and testamentary expenses and costs of the suit were, in the first place, payable ratably out of the pure personalty and out of the personalty savouring of realty, and that after such payment the charitable legacies were to be paid out of the balance of the pure personalty, in precedence of the other legacies.¹

THIS was an appeal by the plaintiff from part of a decree of the Vice-Chancellor Wood. The question, the subject of the appeal, arose upon the construction of a particular clause in the will of Anna Maria Tempest, the testatrix in the cause. The will is very fully set out in the report of the case in the second volume of Messrs. Kay and Johnson's Reports, page 635.

¹ See 1 Jarman Wills (3d Eng. ed.), 215-218: *Beaumont v. Oliveira*, L. R. 4 Ch. Ap. 309; *Robinson v. Geldard*, 3 Mac. & G. 735, and cases in n. (1).

The testatrix, after giving certain specific and pecuniary bequests to the plaintiff, who was also the residuary legatee, and various charitable legacies for or towards the perpetual maintenance and support of certain Roman Catholic secular clergymen and others, proceeded: "And I direct that the charitable bequests bequeathed by this my will shall be paid in precedence of the other pecuniary legacies hereby bequeathed, out of such part of my personal property not specifically bequeathed, as is by law applicable for charitable purposes."

The pure personalty being insufficient to pay all the charitable legacies, the Vice-Chancellor held, that such legacies were demonstrative, and that, following out the principle of *Robinson v.*

Geldard, (a) the debts and funeral and testamentary expenses and the costs of the suit for * administration ought to be paid in the first instance out of the personal estate savouring of realty. From so much of the decree the plaintiff now appealed to the Lord Chancellor.

Mr. Rolt and Mr. Lewin, for the appellant. — The claim of the charity legatees can be supported only on one of two grounds; first, that there is to be a marshalling in favour of a charity; and, secondly, on the ground of an expressed intention. As to the first, it is clearly established that there can be no marshalling in favour of a charity. *The Philanthropic Society v. Kemp*, (b) *Sturge v. Dimsdale*. (c) The case of *Robinson v. Geldard*, (d) which was relied upon in the argument below, and on which the Vice-Chancellor rested his judgment, is clearly distinguishable from the present, because in that case the principal question for which we are contending was conceded, viz., that the debts and funeral expenses were in the first instance to be apportioned ratably among the different descriptions of property; and Lord TRURO observed, that the actual decision against the marshalling of assets in favour of charities had nothing whatever to do with the question before him, which was a contention between two classes of legatees. As to the second point, viz., on the ground of intention, Lord TRURO, in *Robinson v. Geldard*, (d) said: "The fundamental rule of effectuating the lawful intention of the testator, expressed or implied, makes it incumbent upon me to direct that

(a) 3 Mac. & G. 735.

(c) 6 Beav. 462.

(b) 4 Beav. 581.

(d) 3 Mac. & G. 735; see p. 753.

the charitable legacies be paid out of the pure personalty ;” but in the present case there is not a shadow of evidence of an intention, either expressed or implied, that the debts, &c., should be thrown exclusively on the personalty savouring of * realty ; * 472 and we submit, therefore, that the usual order of administration must regulate the distribution of assets.

Mr. Fleming and *Mr. Riddle* appeared for other parties.

Mr. Wickens, for the Attorney-General. — These charitable legacies are clearly demonstrative, and being expressed to be in priority to other legacies the case is made stronger than that of *Robinson v. Geldard*, because, as observed by the Vice-Chancellor, “ If any part of this particular fund be taken to pay the costs, that would increase the fund for payment of the other legacies, including the residuary bequest, at the expense of the fund of pure personalty.”

He referred to *Acton v. Acton*, (a) *Creed v. Creed*, (b) *Sayer v. Sayer*, (c) *Nisbett v. Murray*, (d) 1 *Rop. on Legacies*, p. 169 (ed. 3).

Without calling for a reply, —

The Lord Chancellor said : I will not trouble you, *Mr. Rolt*, to reply. Since this appeal was opened I have had an opportunity of considering the question, and I have formed a very clear opinion. I do not think the point was much argued before the Vice-Chancellor, and the case seems to have been decided on the ground that the decision in *Robinson v. Geldard* (e) governed the present. If I thought so I should have been disposed to agree with the Vice-Chancellor, and even if I did not think the decision quite correct, I should have been loath to have departed from it ; for though I do not consider * myself bound by * 473 the judgment of Lord TRURO, yet I hold it to be most important to have a canon of construction distinctly laid down, and, as a general rule, most expedient to follow the decisions of the superior Court, unless they are clearly erroneous. I think, how-

(a) 1 *Mer.* 178.

(b) 11 *Cl. & Fin.* 491.

(c) 2 *Vern.* 688.

(d) 5 *Ves.* 149.

(e) 3 *Mac. & G.* 785.

ever, that that decision was founded on good sense. [His Lordship adverted to the case of *Robinson v. Geldard*, (a) and proceeded.] Lord TRURO there said he must take the direction in the will to amount to a declaration of intention that the charitable legacies were to be paid out of the pure personalty in preference to the other legacies; he did not say that because they were charitable legacies, therefore that they were demonstrative legacies; he qualified that by saying, that he considered the charitable legacies in that case as having the same incidents as demonstrative legacies to individuals.

A demonstrative legacy is in the nature of a specific legacy, as of so much money, with reference to a particular fund for payment; it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets, yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets. In the construction of particular expressions in a will casuistical cases may be put and arguments may be founded on nice distinctions of words as to the effect of a demonstrative legacy, but here I need not puzzle myself as to whether the legacies are or are not demonstrative; they are in the nature of demonstrative legacies, because the pure personalty is the fund, in the first instance, applicable to their payment; in one sense they are * 474 demonstrative legacies, but in another they are * not demonstrative legacies, because if the particular fund fails they cannot be paid out of the personalty savouring of realty.

It is to be observed, that the testatrix has not directed that her debts or funeral and testamentary expenses should be paid out of that part of the personalty which savours of realty, nor has she expressed any intention to release the pure personalty from its legal liability to contribute to the payment of debts which by law are payable ratably out of both classes of personalty. On the whole, therefore, without at all impugning the doctrine in *Robinson v. Geldard*, (a) the conclusion at which I have arrived is that the decree of the Vice-Chancellor is wrong, to the extent of holding that the debts, funeral and testamentary expenses, and costs of suit for administration, are to be paid in the first instance out of the personal estate savouring of realty.

(a) 3 Mac. & G. 735.

The decree will therefore be varied, by declaring that the debts and funeral expenses and costs of suit must be paid out of the pure personalty and out of the personalty savouring of realty, ratably in proportion to their relative values, and that after such payment the charitable legacies are to be paid out of the balance of the pure personalty, in priority to all other legacies.

* ELLIOT v. INCE.

* 475

1857. January 17, 22, 23, 24, 26, 27. March 26. April 15, 18. Before the Lord Chancellor Lord CRANWORTH.

Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding,¹ but this doctrine is inapplicable to a case where the question is whether the deed of a lunatic altering the provisions of a settlement is valid. A lunatic tenant in tail of copyholds having executed powers of attorney authorizing her attorney first to procure her admission as tenant in tail in the several manors of the copyholds in question; and, secondly, to surrender them after admission and take a readmission in fee: *Held*, that the transaction was invalid, and that the estate tail was not barred; though at the instance of a creditor disputing the lunacy, an issue was directed as to whether the lunatic was, at the time of her executing the powers of attorney, of sound mind.

Leave given to a married woman to appeal by a next friend who was a co-defendant and respondent.²

THIS was an appeal by the defendant, Catherine Elizabeth Ince, the wife of the defendant John Ince, from the decree of the Vice-Chancellor STUART, made on the 30th April, 1856, on the hearing of two motions to vary the chief clerk's certificate, and on the hearing of the cause on further directions, and on its being opened it was objected by

Mr. Bacon and *Mr. Morris*, for the respondents, that it was the appeal of a married woman without a next friend.

¹ See *Price v. Berrington*, 3 Mac. & G. 486, and notes and cases cited; 1 Story Eq. Jur. § 228; *Carr v. Holliday*, 5 Ired. Eq. 167.

² 1 Dan. Ch. Pr. (4th Am. ed.) 110, n. (2), 187.

Mr. Cairns and *Mr. Burdon*, for the appellant, submitted that there was an existing order of the Vice-Chancellor, enabling C. E. Ince to defend the suit without a next friend; that the present was only a rehearing; that it was analogous to the case of a party in contempt, who, though incapable of initiating any proceedings, might, nevertheless, appeal from an adverse order.

The Lord Chancellor, however, held, that the order of the Vice-Chancellor, giving leave to defend without a next friend, did not warrant an appeal without a next friend. His Lordship, on * 476 the undertaking of the appellant's solicitor to pay the costs of the day, permitted the cause to stand over for a week. W. Parker, one of the defendants, who was a trustee of the appellant's marriage settlement, having been nominated as next friend, the respondents obtained leave to serve short notice of motion to remove such next friend.

January 22.

In pursuance of such leave, *Mr. Bacon* and *Mr. Morris*, on behalf of the respondents, now moved to discharge the defendant W. Parker from being the next friend of the appellant, on two grounds: first, because W. Parker was a defendant, and on that account incapacitated from acting as next friend: *Payne v. Little*; (a) and secondly, because he was incompetent to give security for the costs of the suit: *Pennington v. Alvin*, (b) *Stevens v. Williams*, (c) *Wilton v. Hill*, (d) *Hind v. Whitmore*, (e) *Drinan v. Mannix*, (g) *Anonymous*. (h) They submitted that the only case which at all militated with these authorities was that of *Dowden v. Hook*, (i) which must be now regarded as virtually overruled.

Mr. Cairns and *Mr. Burdon*, contra. — There is no such rule as stated by the other side, namely, that a married woman cannot sue by a defendant as her next friend, or that he must be a person of substance; here the next friend is a defendant only as trustee; moreover, a married woman may sue *in forma pauperis*. *Barlee v.*

(a) 13 Beav. 114.

(b) 1 S. & S. 264.

(c) 1 Sim. N. S. 545.

(d) 2 De G., M. & G. 807.

(e) 2 K. & J. 458.

(g) 3 Dru. & War. 154.

(h) 11 Jur. 258.

(i) 8 Beav. 399.

*Barlee, (a) Wellesley v. Wellesley, (b) Anon., (c) Pennington v. Alvin, (d) Drinan * v. Mannix, (e) Dowden v. * 477 Hook, (g) Stevens v. Williams, (h) Wilton v. Hill, (i) Jones v. Fawcett. (k)* The rule is, that a party brought into Court against his will has a right to every protection, and an analogous case to this is that of a cause and cross cause as to security for costs. *Sloggett v. Viant. (l)*

Mr. Bacon, in reply.

[A good deal of evidence as to the solvency of the proposed next friend was gone into on both sides, the result of which is noticed in the judgment.]

THE LORD CHANCELLOR. — If I had in this case to decide the general question as to the practice of the Court, I might require further information. My impression, however, is, that the next friend of a married woman must be a person of substance.¹ It was suggested, that such a rule might tend to hardship, but that suggestion may be met by the fact, that though that is the rule, it is not inflexible, and each particular case may be dealt with by way of exception. When it is said that the next friend must be a solvent person, it means he must be a person whose solvency is patent; and I do not think that affidavits to the contrary are admissible, unless the insolvency is apparent. Here, though there may be circumstances tending to show that the proposed next friend is not a person of substance, yet, according to all principle, I must take what he says as true. It is alleged, that there are bills of sale and unsatisfied judgments pending against him; but in answer * to that, he swears that after payment * 478 of all his just debts, he is worth 100*l.* and upwards. That being so, I cannot hold it a useful practice to permit affidavits to be gone into to contradict his statement on oath. It might be

(a) 1 S. & S. 100.

(b) 16 Sim. 1.

(c) 1 Ves. Jr. 409.

(d) 1 S. & S. 264.

(e) 3 Dru. & War. 154.

(g) 8 Beav. 399.

(h) 1 Sim. N. S. 545.

(i) 2 De G., M. & G. 807.

(k) 2 Phil. 278.

(l) 13 Sim. 187.

¹ 1 Dan. Ch. Pr. (4th Am. ed.) 37, and cases in n. (5), 111; *Wilton v. Hill*, 2 De G., M. & G. 807, and cases in n. (1).

said, that greater security is wanted in cases where the person under disability is an appellant, but I think there is no distinction in principle between the rule as applicable to a next friend in an appeal and in an original proceeding, at least not in favour of an appeal. I am of opinion, that it is no objection that the proposed next friend is a defendant, nor does that fact, as it seems to me, distinguish the case from that of *Dowden v. Hook*; (a) and if solvent, I am at a loss to discover what more can be wanted by the respondents. In the case of an infant there may be a distinction, because though he may have some interest as plaintiff, there may be a mistake; and the Court, for the sake of the infant, not for the other defendants, might not allow costs. As at present advised, therefore, and relying also on the decision of the Vice-Chancellor WOOD in *Hind v. Whitmore*, (b) which is to the same effect as that in *Stevens v. Williams*, (c) and which accords with the judgment of Lord ST. LEONARDS in *Drinan v. Mannix*, (d) it appears to me that the objection is untenable. If it had turned out that the proposed next friend was insolvent, I should not have allowed him to be next friend; but I cannot think that the allegations here justify an investigation by affidavit. The application being unfounded, must be dismissed with costs.

January 24.

The appeal now came on to be heard.

The bill was filed by Cyrus Alexander Elliot, a creditor * 479 * of the late Mrs. Catherine Cumming, against her administratrix, Catherine Elizabeth Ince and John Ince her husband, Bingham Hooper and Thomasine Catherine his wife, who was the sister and co-heiress with the appellant of Catherine Cumming, and W. Parker, a trustee for the appellant, for the usual accounts of the real and personal estate of Catherine Cumming, who had been found a lunatic in December, 1851, as from the 1st of May, 1846.

Catherine Cumming died in June, 1853, and the question was, whether she had effectually barred the entail in certain property, of which she had been tenant in tail. The short facts out of which the question arose were as follow: Nearly ten months after the finding of the inquisition, Catherine Cumming executed

(a) 8 Beav. 399.

(c) 1 Sim. N. S. 545.

(b) 2 K. & J. 458.

(d) 3 Dru. & War. 154.

powers of attorney, authorizing her attorney first to procure her admission into certain manors of the copyholds in question; and secondly, to surrender them after admission, and take a re-admission in fee. This was duly effected on the 9th March, 1847. In 1850 she was admitted into certain other manors of the copyholds in question.

By the decree dated the 12th July, 1853, the usual inquiries as to real and personal estate were directed; and by the eighth direction in the decree, an inquiry was directed as to what real estate the intestate, Catherine Cumming, was seised of or entitled to at the time of her lunacy, and what real estate she was seised of or entitled to at the time of her death.

The chief clerk, by his certificate dated 28th February, 1856, certified that the said Catherine Cumming was, at the date of her lunacy (1st May, 1846) seised in fee-simple of the real estate set forth in the first part of the 4th schedule thereto, and that she died so seised thereof subject to a mortgage thereon, dated the 18th * April, 1850, to Archibald James Campbell, for * 480 securing the payment of a sum of 3250*l.* and interest. He also found that Catherine Cumming was, at the time of her lunacy and of her death, entitled to the copyhold premises mentioned in the second part of the 4th schedule thereto, subject to the limitations of the settlement made upon the marriage of her father and mother Thomas Prichard and Catherine Seys his wife, dated the 19th and 20th July, 1776. He also certified, that Catherine Cumming was, at the time of her lunacy, seised of the several pieces or parcels of land mentioned in the third part of the 4th schedule thereto, but that prior to her death she had alienated the same. He also certified, that Catherine Cumming had, at the time of her lunacy, and down to the time of her death, under the will of her father Thomas Prichard, a life-interest in the lands and hereditaments mentioned in the fourth part of the said 4th schedule. He further certified, in answer to the tenth and eleventh inquiries directed by the said decree, that it was not advisable that any proceedings should be taken to set aside any conveyances or assurances of such last-mentioned lands and hereditaments.

The plaintiff sought to have the chief clerk's certificate varied as to the lands and hereditaments comprised in the second part of the 4th schedule thereto, by omitting the words "subject to

the limitations of the settlement made upon the marriage of her father and mother Thomas Prichard and Catherine Seys his wife, dated the 19th and 20th July, 1776, and by adding a finding that the intestate Catherine Cumming was seised of or otherwise well entitled to the hereditaments comprised in the second part of the 4th schedule to the said certificate for an estate of inheritance in fee according to the custom of the manor or respective manors of which the same were holden."

* 481 * It appeared that Thomas Prichard was possessed of the lands in question at the time of his marriage; and that on the 26th February, 1778, two years afterwards, he and his wife surrendered the same, with other lands, into the hands of the lord of the manor, "to the use of the said Thomas Prichard and Catherine his wife for and during the term of their natural lives, and the natural life of the survivor, or longest liver of them both, and from and after the decease of the said Thomas Prichard and Catherine his wife, and the decease of the survivor of them, to the use and behoof of the heirs of the body of the said Catherine by the said Thomas Prichard, lawfully begotten, or to be begotten, and for want of such heirs, to the use and behoof of the said Thomas Prichard and his right heirs for ever according to the custom of the said manor."

Catherine Cumming did not get admitted to the lands in question on the death of her father and mother, but on the 1st of March, 1847 (part of the land being required for the purposes of a railway), she executed a power of attorney, and thereby authorized her attorney to get admitted to certain portions of her copyhold estates, and thereupon to surrender the same into the hands of the lord to bar the estate tail of the lands within the manors created by the settlement and the estate tail created by the surrender of the 26th February, 1778. On the 9th of March, 1847, she was accordingly admitted to these lands as tenant by her attorney, and on the same day, by the said attorney having surrendered the same, was readmitted as tenant in fee according to the custom.

In August, 1850, Catherine Cumming was, by attorney, admitted tenant to, and barred the equitable estate tail created by the
 * 482 indenture of settlement of the 20th July, * 1776, of certain other portions of her copyhold estate, as to part of which there had also been sales by Catherine Cumming in her lifetime.

In the year 1848, the defendants B. Hooper and Thomasine Catherine his wife filed a bill against Catherine Cumming to restrain her from selling or disposing of any part of such property; and by the decree made on the hearing of the cause, to which the appellant was party, the bill was dismissed, the appellant (Catherine Elizabeth Ince) consenting to the purchase-money of the part contracted to be sold being paid to Catherine Cumming. The appellant, by her appeal, insisted that the admittances and surrenders of 1847 and 1850 were altogether void, and that the estate tail therein not having been effectually barred, was not available for the payment of creditors. John Ince having become bankrupt after the institution of the suit, his assignees were made parties by the usual order to revive the suit against them.

The Vice-Chancellor STUART having held that the entail was effectually barred, notwithstanding the lunacy, the defendant, Catherine Elizabeth Ince, now appealed to the Lord Chancellor.

Mr. Cairns and *Mr. Burdon*, in support of the appeal.—We submit that the execution of the powers of attorney by Catherine Cumming was a mere nullity, the lunacy overriding the act. The case of *Molton v. Camroux*, (a) and the other cases which will be relied upon, were all cases of contract, and are quite distinguishable from the present, which concerns a purely voluntary act on the part of Catherine Cumming, unsupported by any consideration. Under these circumstances, neither of the surrenders * can be availing. *Ex parte Roberts*, (b) *Hume v.* * 483 *Burton*, (c) *Kirkwall v. Flight*, (d) *Campbell v. Hooper*, (e) *Jacobs v. Richards*, (g) *Niell v. Morley*. (h) It will also be alleged, that the appellant, as party to the suit of *Hooper v. Cumming*, consented to the dismissal of the bill, and is estopped from now calling in question the validity of the surrenders; it is to be observed, however, that the object of that suit was not to impeach

(a) 2 Exch. 487; and, in error, 4 Exch. 77.

(b) 3 Atk. 5, 308.

(c) Cruise on Recov. Append.; 1 Ridge Parl. Cas. 16.

(d) 3 Weekly Reporter, 529.

(e) 3 Weekly Reporter, 528.

(g) 18 Beav. 300; S. C., 5 De G., M. & G. 55.

(h) 9 Ves. 478.

the surrenders, but to compel Catherine Cumming to elect between the benefits under her father's will and certain other rights which were asserted on her behalf. Moreover, the order in *Hooper v. Cumming* was not by the consent of the present appellant, because, as a married woman, she was incapable of consenting.

Mr. Bacon and *Mr. Morris*, for Cyrus A. Elliot, the plaintiff, in support of the decree. — Although we admit that *prima facie* the presumption of the invalidity of the surrender is against us, yet it is submitted that there were many circumstances connected with this case which rebut such presumption, as, for instance, the fact that permission was given to Catherine Cumming to traverse.

They urged the argument of estoppel as anticipated by the appellants' counsel. They also contended, that the act even of a lunatic, if he derived any benefit therefrom, would be supported in equity; and they relied upon the cases of *Sergeson v. Sealy*, (a) *Price v. Berrington*, (b) *Molton v. Camroux*, (c) *Ex parte Bradbury*. (d)

* 484 * *Mr. Walker* and *Mr. Hemming*, for the assignees of John Ince, also supported the decree of the Court below, and, in addition to the cases already mentioned, referred to *Thompson v. Leach*. (e)

[The Lord Chancellor said a difficulty presented itself to his mind in holding that the deed of a lunatic was void, considering that a lunatic whose lunacy was not superseded might in law make a valid will, if proved to have been made in a lucid interval.¹]

Mr. Cairns, in reply. — It is quite clear that the burden of proving the sanity of a person found lunatic rests with the individual asserting the sanity during the period overridden by the finding. *Hall v. Warren*, (g) *Snook v. Watts*. (h) Here there is not even

(a) 2 Atk. 412.

(b) 3 Mac. & G. 486.

(c) 2 Exch. 487; and, in error, 4 Exch. 77.

(d) Mont. & Ch. 625.

(g) 9 Ves. 605.

(e) 3 Mod. 301.

(h) 11 Beav. 105.

¹ See 1 Jarman Wills (4th Am. ed.), 81, 82; *Breed v. Pratt*, 18 Pick. 115; *Stone v. Damon*, 12 Mass. 488; *Crowningshield v. Crowningshield*, 2 Gray, 531.

an allegation of a lucid interval, and the only pretence in this case for supposing the sanity is that Catherine Cumming had obtained leave to traverse the inquisition. It is also to be observed that the parties who are now seeking a reinvestigation are, first, the plaintiff, who is a creditor claiming on the ground that Catherine Cumming was a lunatic; and second, the assignees of the bankrupt John Ince, at whose instance the inquisition was promoted. Beyond all doubt there is no case of estoppel, as no consent by the appellant under the circumstances would be binding upon her. *Turner v. Turner*, (a) *Robinson v. Wheelwright*. (b)

At the conclusion of the argument, the Lord Chancellor said he should not dispose of the case without attentively considering the important questions which had been raised. As then advised he did not think that, even assuming the recovery was invalid, he should be inclined * to shut out the plaintiff * 485 from an investigation of all the circumstances connected with his claim.

March 26.

THE LORD CHANCELLOR. — The present was a claim by a creditor of Catherine Cumming, deceased, against her administratrix and her husband, for the usual accounts of the deceased's real and personal estate.

Catherine Cumming had in January, 1852, been found a lunatic, on a commission issued at the instance of her daughters and their husbands. The lunacy was carried back to the 1st May, 1846. Catherine Cumming died in June, 1853. The decree in this suit was pronounced on the 12th July, 1853. On the 28th January, 1855, the chief clerk made his certificate, finding that Catherine Cumming was at the time of her lunacy and of her death entitled to the copyhold premises mentioned in the second part of the 4th schedule to his certificate, subject to the limitations of the settlement made upon the marriage of her father and mother, which made her tenant in tail, and the chief clerk considered her so to continue up to the time of her death.

On the 30th April, 1856, the Vice-Chancellor varied the certifi-

(a) 2 De G., M. & G. 28.

(b) 6 De G., M. & G. 535.

cate of the chief clerk as to the copyhold in question, by declaring that Catherine Cumming was seised in fee. That portion of the order of the Vice-Chancellor was brought before me by way of appeal, and the question is as to the effect of certain deeds and acts of Catherine Cumming, executed and done for the purpose of barring the entail. The finding of the jury on the inquisition is *prima facie* evidence that she was lunatic from the 1st of * 486 May, 1846. The entail if barred was barred * by her acts on the 9th of March, 1847. Previously to that day she executed powers of attorney authorizing her attorney, first, to procure her admission as tenant in tail in the several manors of the copyholds in question; and secondly, to surrender them after admission, and take a readmission in fee. This was done on the 9th of March, 1847. Though she must *prima facie* be taken to have been then of unsound mind, yet it was argued that the entail was effectually barred. The grounds relied on were that such acts of record as levying a fine or suffering a recovery are not void even if done by a lunatic; and equivalent proceedings as to copyholds in the Lords' Court would, it was said, stand in the same position. But there are two answers to that argument. In the first place, the whole argument in similar cases has proceeded on the fiction that fines and recoveries were judicial proceedings, and so that the competency of the parties must be taken to have been established to the satisfaction of the Court. This fiction now no longer exists. Entails are barred by mere deeds, and no more weight can be given to a disentailing deed than to any other deed. Even before this change of the law the fiction would not have prevailed if the tenant to the *præcipe* had been created by the deed of the lunatic, or if he had been vouched not in person but by attorney. For the heir might aver that the lunatic, when he executed the deed or power of attorney, on which all would depend, was of unsound mind, and if that were so then the substratum on which the proceedings or record must rest would be removed. Here all depends on the validity of the power of attorney.

The second ground on which the argument rested was, that the recovery was for the benefit of the lunatic, and so not void. This cannot be sustained; for, in the first place, the act in this * 487 case was not necessarily * for her benefit; and secondly, assuming it to have been for her benefit, I can find no such

doctrine established by the authorities. The case of *Molton v. Camroux*, (a) which has been so much relied on, went on no such ground. The principle of that case was very sound; namely, that an executed contract, where parties have been dealing fairly and in ignorance of the lunacy, shall not afterwards be set aside. That was a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe. How is a shopkeeper who sells his goods to know whether a customer is or not of sound mind? Perhaps the same principle may apply to sales of land or mortgages. Lord TRURO seems to have thought it would; so at least I collect from what he says in *Price v. Berington*. (b) But it is obvious that no such question can arise when there is no contract for value, when in fact there has been merely a dealing by the lunatic with his own property without any consideration passing from others. Still less is the principle on which Sir WILLIAM GRANT acted in *Niell v. Morley*, (c) applicable. There the plaintiff had made large purchases for the purposes of his trade at a public auction, and the evidence failed to show that the seller was aware of any want of capacity on the part of the plaintiff, who, however, was afterwards found to have been lunatic from a date prior to the auction. Sir WILLIAM GRANT refused, on a bill filed by the lunatic and his committee, to give any equitable relief, leaving them to take any legal remedy which might be open to them. On a somewhat similar principle Lord HARDWICKE decided the case of *Sergeson v. Sealy*. (d) There the lunatic, before any commission had issued, and while he was apparently sane, purchased * a small real estate, which was duly * 488 conveyed to him in fee; afterwards a commission issued, under which he was found lunatic from a day prior to the purchase. After his death Lord HARDWICKE, on a question between his real and personal representatives, would not treat the real estate as if it were money, but allowed the legal right of the heir to prevail.

The result of the authorities seems to be, that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent

(a) 2 Exch. 487, and, in error, 4 Exch. 77.

(b) 3 M. & G. 498.

(d) 2 Atk. 412.

(c) 9 Ves. 478.

understanding. But this does not touch the present case, where the question is, whether the deed of a lunatic, altering the provisions of a settlement, is valid. I am of opinion that there is no principle or authority which warrants the affirmative of that proposition, and consequently that so much of the order of the Vice-Chancellor as varies the certificate in this respect must be omitted.

It was contended that, whatever the truth of the case might be, the daughters of Catherine Cumming were estopped by their conduct in a former suit from disputing the sanity of their mother. There is nothing in this objection, for on looking to the decree in that suit, it appears that they did not (indeed as married women they could not) consent to what was done; so that, even supposing the argument to be sound, that a consent in that suit would operate as an estoppel in this, yet the consequence contended for does not follow, for there was no consent. I must state in my order that it is made without prejudice to any application which may be made for the purpose of traversing the inquisition by which Catherine Cumming was found to be a lunatic.

April 18.

* 489 * On this day his Lordship intimated his opinion that an issue and not a traverse would be the proper mode of trying the question, and that the form of the issues in the present case as to each of the powers of attorney would be, whether at the time when they were executed and acted on respectively, Catherine Cumming was of sound mind, so as to be sufficient for the government of herself, her lands, and possessions. (a)

(a) The plaintiff having declined to try the issues, the Lord Chancellor, by an order dated the 12th November, 1857, made on the motion of certain other of the creditors of Catherine Cumming who had proved their debts in the suit, gave liberty to any two of them to be substituted in the place of the plaintiff for the purpose of trying the above issues, they at the same time giving security to C. E. Ince for payment of her costs of the issues if unsuccessful: this security was ultimately fixed by the Vice-Chancellor STUART in the sum of 1000*l*. The creditors having been unable to give the required security, the issues were, by virtue of an order of the Lord Chancellor dated the 1st February, 1858, ordered to be taken *pro confesso* against the parties moving; and ultimately, on the 13th February, 1858, the Lord Chancellor ordered the decree of the Vice-Chancellor STUART to be altered so far as it varied the chief clerk's certificate, thus restoring the finding of the chief clerk as to the copyhold lands in question, which in effect gave them to the two daughters of Catherine Cumming as co-heiresses in tail.

* CROOK v. WHITLEY.

* 490

1857. February 25, 28. Before the Lord Chancellor Lord CRANWORTH.

A testatrix gave "to each of the present nieces of A. B. for her own absolute benefit the sum of 2000*l.*, and in case any of them shall die in my lifetime leaving a child or children who shall survive me, then and in every or any such case the legacy intended for her so dying shall go to her child or children in equal shares, if more than one." At the date of the will and death of the testatrix there was only one niece of A. B. alive, but there were several grandnieces and great-grandnieces: *Held*, that the bequest was confined in its terms to the niece of the first degree, and that the children of nieces who were dead at the date of the will were not entitled to take by substitution.¹

ANN ORRED, by her will dated the 12th August, 1847, after devising certain real estate to John Johnson, as to whom she declared by her will her belief that he was the nearest male relative of her late mother, through whom she had acquired considerable property, and after giving certain pecuniary legacies, made the following bequest: "I bequeath unto each of the present nieces of Peter Eaton, late of Alton, in the county of Chester, surgeon, deceased, for her own absolute benefit, the sum of 2000*l.*, and in case any of them shall die in my lifetime, leaving a child or children who shall survive me, then and in every or any such case the legacy intended for her so dying shall go to her child or children in equal shares if more than one."

The testatrix died on the 18th September, 1852.

Peter Eaton, who was first cousin once removed of the testatrix, was born in 1747, and died in 1792. He had one brother and two sisters. The brother died in 1801, without having ever had any child. One of the sisters of Peter Eaton had five children, two sons and three daughters; of these daughters, Sarah Eccles was still living, the other two had died in 1829 and 1837 respectively. The other sister of Peter Eaton had issue, four sons and four

¹ See 1 Jarman Wills (3d Eng. ed.), 189, 718, 729; 2 Story Eq. Jur. § 1065 c; Stoddart v. Nelson, 6 De G., M. & G. 68, and cases in n. (1); Shull v. Johnson, 2 Jones Eq. N. C. 202; 2 Jarman Wills (4th Am. ed.), 52 *et seq.* and notes; *In re Blower's Trusts*, L. R. 11 Eq. 97; *In re Hotchkiss's Trusts*, L. R. 8 Eq. 643.

daughters; the daughters had died in 1795, 1797, 1841, and 1847 respectively. At the date of the will of the testatrix, only
 * 491 one niece of the first degree * of Peter Eaton was living; namely, Sarah Eccles, then a widow, upwards of seventy-five years old. Sarah Eccles had had two children, who were both dead at the date of the will. One of these two children had left four children. At the date of the will there were living in all thirty-nine nieces, grandnieces, and great-grandnieces of Peter Eaton, only one, Sarah Eccles, of the first degree, sixteen of the second degree, and twenty-two of the third degree. The question raised in the suit was, as to the meaning to be ascribed to the term "nieces," the plaintiffs contending that the word did not necessarily indicate nieces of the first degree only, and that under the bequests to "each of the present nieces of Peter Eaton," his grandnieces and great-grandnieces were entitled to take. In order to obtain the decision of this Court in a short and expeditious manner, the defendants, who were the executors and residuary legatees of the will, had demurred to the bill.

The Vice-Chancellor WOOD having allowed the demurrer, the effect of which was to exclude great-nieces, the plaintiff now appealed to the Lord Chancellor.

Mr. Aston and *Mr. Turner*, in support of the appeal, submitted, that, according to the recognized canon of construction, as laid down by Sir J. WIGRAM in the third proposition in his *Treatise on the Application of Extrinsic Evidence to Interpretation of Wills*, the word nieces ought to be construed in its secondary and popular sense, inasmuch as if the primary signification of the word was adopted, it would be insensible with reference to the extrinsic circumstances of the case; namely, the state of the family at the date of the will, which the testatrix must be presumed to have known. They urged, that this Court was not at liberty to reject any words in a will on the suspicion that the testator
 * 492 * did not know what he meant. *Milnes v. Slater*. (a) They relied upon the authority of the case of *Gill v. Shelley*, (b) where the testatrix gave the residue of her real and personal estate to her husband for life, and directed that, after his death, the residue should be divided among certain classes of persons men-

(a) 8 Ves. 295; see p. 306.

(b) 2 Russ. & M. 336.

tioned in her will, and added, "amongst whom I include the children of the late Mary Gladman," who had left only one legitimate and one illegitimate child, and Sir JOHN LEACH held, that the illegitimate child was, under the circumstances, entitled to share with the representative of the deceased legitimate child. They urged that the cases of *Wilkinson v. Adam*, (a) *Swaine v. Kennerley*, (b) and *Hart v. Durand*, (c) which might be relied on on the other side, were clearly distinguishable, or if not, had been overruled by *Gill v. Shelley*. (d) They referred to *Stoddart v. Nelson*, (e) where the word cousins was held to mean first cousins only, but submitted, that the construction there was not at variance with their contention, inasmuch as in *Stoddart v. Nelson*, there being more than one first cousin, there was no necessity for having recourse to a more extended signification. They also cited *Congreve v. Palmer*, (g) and *Giles v. Giles*, (h) and submitted, that, in those cases, the children of children were excluded because they could not take by substitution, but that the appellants' contention was, that the great-nieces took in the first instance, and not by substitution. They also referred to, and commented on, the following cases: *Harris v. Stewart*, cited in *Wilkinson v. Adam*, (a) *Coote v. Boyd*, (i) *Goodinge v. Goodinge*, (k) *Radcliffe v. Buckley*, (l) *Maybank v. Brooks*, (m) *Hampshire v. Peirce*, (n) *Wyth v. Blackman*, (o) *Gale v. Ben-net*, (p) *Lord Woodhouslee v. Dalrymple*, (q) *Thomas v. Thomas*, (r) *Steede v. Berrier*, (s) *Norton v. Barker*, (t) *The Earl of Orford v. Churchill*, (u) *Shelley v. Bryer*, (v) *Owen v. Bryant*, (w) *Slade v. Fooks*, (x) *Leigh v. Byron*, (y) *Charge v. Goodyer*, (z) *Crossly v. Clare*, (aa) *Darrel v. Molesworth*, (bb) *Ive v. King*, (cc) *Smith v.*

(a) 1 V. & B. 422; see p. 434.

(b) *Ibid.* 469.

(c) 3 Anst. 864.

(d) 2 Russ. & M. 336.

(e) 6 De G., M. & G. 68.

(g) 16 Beav. 435.

(h) 8 Sim. 360.

(i) 2 Bro. C. C. 521.

(k) 1 Ves. 231.

(l) 10 Ves. 195.

(m) 1 Bro. C. C. 84.

(n) 2 Ves. 216.

(o) 1 Ves. 196.

(p) Amb. 681.

(q) 2 Mer. 419.

(r) 6 Term, 671.

(s) Freem. K. B. 292, 477.

(t) Freem. Chanc. 190.

(u) 3 V. & B. 59.

(v) Jac. 207.

(w) 2 De G., M. & G. 697.

(x) 9 Sim. 386.

(y) 1 Sm. & Gif. 486.

(z) 3 Russ. 140.

(aa) Amb. 397.

(bb) 2 Vern. 378.

(cc) 16 Beav. 46.

Smith, (a) Jarvis v. Pond, (b) Waring v. Lee, (c) Falkner v. Butler, (d) James v. Smith, (e) Lane v. Green, (g) Sanderson v. Bayley, (h) Fraser v. Pigott, (i) Meredith v. Farr, (k) Ringrose v. Bramham, (l) Leake v. Robinson, (m) Storrs v. Benbow. (n)

Mr. Rolt and Mr. Little, for the respondents. — One of the most firmly established rules in the interpretation of wills is, that if you can give to words in a will their strict primary and legal meaning, you are not at liberty to apply a secondary sense ; and it is only when it has become impossible to apply the primary, that recourse may be had to the secondary, meaning of a word. In the case of *Gill v. Shelley, (o)* which was mainly relied upon * 494 by the appellants, the testatrix was proved * to have been aware of the existence of the illegitimate child, and to have known the state of the family.

[THE LORD CHANCELLOR. — The word children, as construed at law, excludes illegitimate children by an artificial rule ; they are nevertheless equally children, and when you can show that a testator must have so considered them, they will of course be let in.]

We submit, that no authority can be produced where a testator has used expressions indicative of a class that the same word has been held to include persons of different degrees in the same class. They relied upon the cases of *Crooke v. Brookeing, (p) Lord Orford v. Churchill, (q) Radcliffe v. Buckley, (r) Slade v. Fooks, (s) Lane v. Green, (g) Shelley v. Bryer, (t) Christopherson v. Naylor, (u) Gray v. Garman, (v) Beaumont v. Fell, (w) Falkner v. Butler, (d) Moor v. Raisbeck. (x)*

Mr. Aston, in reply.

(a) 8 Sim. 353.

(b) 9 Sim. 549.

(c) 8 Beav. 247.

(d) Amb. 514.

(e) 14 Sim. 214.

(g) 4 De G. & Sm. 239.

(h) 4 Myl. & Cr. 56.

(i) Younge, 354.

(k) 2 Y. & C. C. C. 525.

(l) 2 Cox, 384.

(m) 2 Mer. 363.

(n) 3 De G., M. & G. 390.

(o) 2 Russ. & M. 336.

(p) 2 Vern. 106.

(q) 3 V. & B. 59.

(r) 10 Ves. 195.

(s) 9 Sim. 386.

(t) Jac. 207.

(u) 1 Mer. 320.

(v) 2 Hare, 268.

(w) 2 P. Wms. 140.

(x) 12 Sim. 120.

THE LORD CHANCELLOR. — I never entertained a doubt as to the propriety of dismissing this appeal. One reason for hearing the case at length was, that the plaintiffs were suing on behalf of absent parties, and the amount in question was very large. According to the ordinary rule of construction the word nieces as used in this will must be taken in its natural sense, which beyond all doubt means the children of a brother or sister. The word is derived from the Latin *nepos*, signifying a grandchild, but it is clear that * such an interpretation could not now be * 495 given to the word nephew or niece. It may happen, although a will is unambiguous on the face of it, yet that extrinsic circumstances may show that you are to give the words a meaning different from what they apparently signify; as, for instance, where a testator gives all his property to the children of a particular individual, and there are no children but grandchildren, in such a case the term children will be construed to include descendants.¹ So, too, a testator may have used words in an artificial or secondary sense, but I do not know any case in which it has been held that the same word can be construed to include persons of different degrees together in the same class. Nor do I think the case is at all altered when the testator, as in the present instance, has used words in the plural, and there happens to be only one person to whom the term is properly applicable. Here the word nieces might doubtless be construed as grandnieces, but when there is no evidence that the testatrix has used the word in any other sense than that of niece proper, it would be contrary to all precedent to give the term a more extended signification. [His Lordship here read the words of the will, and after observing that P. Eaton had been the first cousin of the testatrix and had died upwards of a century ago, leaving seven nieces, proceeded:] The testatrix must have known that there had been more than one niece, though she may have believed that there were some deceased. The doubt has arisen from the fact of there being only one such niece at the date of the will. It was not contended that she meant to exclude that one, but that she must be understood to have meant to include grandnieces also. I think that it cannot be so understood, and the case of *Crooke v. Brookeing*, (a) is a clear

(a) 2 Vern. 106.

¹ See 2 Jarman Wills (3d Eng. ed.), 135 *et seq.*, (4th Am. ed.) 52 n. (1); *Ewing v. Handley*, 4 Litt. 349; *Drayton v. Drayton*, 1 Dessaus. 327.

authority on this point. In that case, there was a gift of
 * 496 * a sum of money in trust for the children of A., and A. had
 only one child and several grandchildren, it was held that
 the child only should take and not the grandchildren. It appears
 to me that in all probability the testatrix in the present case did
 not know the exact state of the family of P. Eaton. It was
 argued, however, that she must be presumed to have known it.
 Such a presumption appears to me quite untenable, and were I to
 hold that on such an hypothesis the children of nieces were to be
 let in, it would be impossible to stop at the first degree,—just as
 in *Stoddart v. Nelson*, (a) where the question was with respect to
 cousins, and I was of opinion that the limit must be drawn so as
 to include first cousins only. The only doubt I ever entertained
 arose from the clause “any of them should die in my lifetime,”
 &c.; that undoubtedly imported a plurality, though not more so
 than the expression “each of the present nieces;” but that does
 not vary the principle of construction.

It appears to me so perfectly clear a case, that I do not think it
 necessary to refer to the authorities which have been cited. No
 doubt there may be a state of circumstances where a secondary
 meaning may be given to words, but, as I have already observed,
 there exists no such necessity in the present instance. I must
 therefore dismiss this appeal, but I will give the appellants leave
 to amend the bill within a month, if they are in a condition to
 adduce any evidence as to the testatrix’s knowledge of the state of
 the family of P. Eaton.

* 497 * The MAYOR, ALDERMEN, and BURGESSES of the
 Borough of BERWICK-UPON-TWEED v. MURRAY.

1856. November 21, 22, 24, 25. December 24. 1857. January 12. March
 7. Before the Lord Chancellor Lord CRANWORTH.

A., one of three sureties who had become bound to the extent of 2000*l.* to a
 corporation for the due accounting of the office of its treasurer by B., received
 formal notice from the corporation that B. was a defaulter, and on the next

(a) 6 De G., M. & G. 68.

day took from B. a deposit note of a bank for 2300*l.*, which had been placed in the bank by B. one month previously in the name of his daughter. On a bill filed by the corporation against B., who had absconded, and the three sureties to make good the amount found due by B. *ultra* the 2300*l.*: *Held*, establishing the liability of the trustees, that the circumstances under which A. received the 2300*l.* were such as ought to have induced him to make inquiry, and that, having neglected to do so, he was bound to restore that amount with interest after the rate of 5*l.* per cent.¹

One of the sureties having died after the claims of the plaintiffs against them had been established, and after a sum of money had been paid by them into Court: *Held*, that, for the purposes of the suit, a representative of the deceased surety was a necessary party; though the Court refused to declare in the suit as constituted, the liabilities of the sureties *inter se*.

THIS case now came on before the Lord Chancellor upon the equity reserved, pending an appeal on a writ of error to the House of Lords in the case of *Oswald v. The Mayor, Aldermen, and Burgesses of the Borough of Berwick-upon-Tweed*, reported in the fifth volume of House of Lords Cases, p. 856.

The following statement, which comprises all the material facts of the case, is extracted from the judgment of the Lord Chancellor, and is inserted here for the convenience of the reader. The original bill in this case was filed on the 31st October, 1848, by the Mayor, Aldermen, and Burgesses of Berwick-upon-Tweed against David Murray, who had been treasurer of the corporation, and against William Murray, John Campbell Renton, and James Jeffreys Oswald, his sureties. It stated the appointment of David Murray to the office of treasurer in the month of December, 1841, and his removal on the 24th June, 1848, and it further stated that the defendants William Murray, John * Campbell Ren- * 498 ton, and James Jeffreys Oswald, together with John Johnston, since deceased, had become bound as sureties to the extent of 2000*l.*, conditioned for the due accounting by David Murray for all money to be received by him as such treasurer. The bill then stated that large sums had been received by David Murray as treasurer, that his accounts had been duly audited, pursuant to the Municipal Act, up to the 1st March, 1848, when a large balance remained in his hands, and it therefore prayed an account of his receipts and payments after that day; and that, in taking such account, he might be charged with the said balance so then re-

¹ See *Lewin Trusts* (5th Eng. ed.), 277, 278.

remaining in his hands, and might be decreed to pay to C. R. Burnett, who had been appointed treasurer in his place, the balance which should be found due from him on taking the accounts, and might be ordered to pay the costs of the suit; and it further prayed against the defendants William Murray, John Campbell Renton, and James Jeffreys Oswald, the surviving sureties, that they might be declared, without prejudice to the right of the plaintiffs against David Murray, to be liable to the extent of 2000*l.* to make good the sum due from David Murray, together with the costs of the suit.

The defendants all answered, issue was joined, witnesses were examined, and the cause came on to be heard before the late Vice-Chancellor of England on the 1st March, 1850, and by the decree then made accounts were directed according to the prayer, and the defendants were ordered to pay the plaintiffs their costs up to the hearing. Further directions were reserved.

The defendants, the sureties, being dissatisfied with this decree, presented a petition of rehearing, and the cause was accordingly reheard before the Lords Justices on the 20th April, 1852.

* 499 The application for rehearing * by the sureties rested on the ground that, according to the true construction of their bond, they had ceased to be liable for the acts and defaults of David Murray since the year 1842, up to which time he had duly accounted for every thing he had received. On the 20th March, 1852, before the cause was thus reheard, the Master, to whom the accounts had been referred, made his report, whereby he found that a sum of 3368*l.* 3*s.* 4*d.* was due from David Murray as treasurer.

On the rehearing before the Lords Justices, it appeared to their Lordships that the question whether the sureties continued liable on the bond was a purely legal question, and they reversed so much of the original decree as ordered the defendants to pay the costs up to the hearing, and reserved the consideration of costs till after the trial of the action or actions thereafter mentioned; and they gave liberty to the plaintiffs to bring an action or actions on the bond, the sureties agreeing to admit the finding of the Master as evidence of the amount due from David Murray, but the judgment or judgments in the action or actions were to be dealt with as the Court should direct. The costs of the appeal were reserved.

The plaintiffs, pursuant to the liberty thus given to them,

brought three several actions in the Court of Queen's Bench on the bond, *i.e.*, one against the executors of William Murray, who had died after the decree of the Lords Justices, another against Renton, and a third against Oswald. In all these actions the plaintiffs succeeded; first in the Court of Queen's Bench, then in the Exchequer Chamber, and ultimately in the House of Lords, whither the cause was brought by writ of error.

The important question raised in the argument before * the Lord Chancellor related, not to the original, but to * 500 the supplemental bill. The parties to this supplemental bill were the same as to the original bill. It was filed on the 7th August, 1849. It stated the proceedings in the original suit, and particularly that the defendant David Murray, by his answer, admitted that he had in his hands, as treasurer, a sum of 3323*l.*; and that, by an order in the original cause, made on the 8th February, 1849, by the late Vice-Chancellor of England, it was ordered that he should, within a week, bring that sum into Court, but that he absconded, and fled beyond the seas out of the jurisdiction of the Court, and failed to comply with the order, though all process of contempt was duly issued against him.

The supplemental bill then proceeded to state, that, shortly before the 30th September, 1848, David Murray placed a sum of 2300*l.*, part of the money of the plaintiffs then in his hands as treasurer, in the branch bank at Dunse, in Scotland of the British Linen Company, in the name of his daughter Jane Johnston Murray, on a deposit receipt, which carried interest; and that, in consequence of a notice served on the sureties, informing them that the plaintiffs would hold them responsible on their bond for the defaults of David Murray, William Murray demanded from David some security by way of indemnity. That, in compliance with this demand, David Murray did, on the 30th September, 1848, hand over to William Murray the deposit note, and afterwards caused the same to be indorsed by his daughter in favour of William Murray. That, accordingly, early in March, 1849, after David Murray had so absconded, William Murray drew out the 2300*l.*, and on the 6th March deposited the same in his own name, at interest, in the branch bank, at Eyemouth, of the Commercial Bank of * Scotland, where the same then still * 501 remained, except a sum of 65*l.* 2*s.*, which he had subsequently drawn out; and that, when William Murray received this

deposit receipt, he knew that the 2300*l.* therein mentioned formed part of the money of the plaintiffs in the hands of the said David Murray as their treasurer. The supplemental bill, therefore, prayed that the defendant William Murray might be decreed to pay over to Burnett, the new treasurer, the whole of the 2300*l.*, with interest from the 30th September, 1848, at 5 per cent; and that it might be declared that the aforesaid sum of 2300*l.* was not applicable to the discharge of the obligations of suretyship created by the bond, but that the defendants, the sureties, were liable to the extent of 2000*l.*, beyond the 2300*l.* and interest, to make good what should be found due from David Murray; and that the defendants, the sureties, might be ordered to pay the costs of the supplemental suit.

The defendants, the sureties, all put in answers to the supplemental bill; but David Murray, the principal defendant to the original bill, never came within the jurisdiction, and so the cause necessarily proceeded in his absence. The defendant William Murray, by his answer, admitted the receipt of the 2300*l.*, as stated in the supplemental bill, but he claimed to retain it by way of indemnity against the demand then made on him by virtue of his bond as surety; and he averred, that when the deposit receipt was delivered to him he believed the 2300*l.* to be the proper money of David Murray, and had no notice that any part of it belonged to the plaintiffs; and he insisted that, in fact, no part of it was the money of the plaintiffs. The other sureties, Renton and Oswald, stated that they were strangers to the transaction, but they claimed the benefit of the deposit, so far

* 502 * as it should turn out to be a valid transaction. Issue

having been joined, witnesses were examined; but, before any thing further was done, William Murray died, and the causes, both original and supplemental, were revived against his executors, the defendants Dobie and Custans.

The original cause, thus revived, was then set down to be heard before the Lords Justices in the year 1854. The legal question, as to the liability on the bond, had not then been finally disposed of in the House of Lords, and the sureties, therefore, objected to the cause being heard till that matter was finally settled, and the Lords Justices, feeling that this objection had considerable force in it, made an order on the 15th June, 1854, that the executors of William Murray should bring the 2300*l.* into Court, to the credit

of the supplemental as well as the original cause; and that they, together with the other sureties, should bring into Court a further sum of 500*l.*, such payments into Court being made without prejudice to any question whatever. These sums of 2300*l.* and 500*l.* were duly paid into Court pursuant to the order, and had been invested in the purchase of three per cents, and accumulated in trust in the causes.

The legal question was finally decided in the House of Lords against the sureties in the last session of Parliament, (a) and the causes were heard before the Lord Chancellor in Michaelmas term, 1856.

The Attorney-General (Sir RICHARD BETHELL), *Mr. Craig* and *Mr. Grenside*, for the corporation. — First, it is scarcely denied that the money which * was withdrawn by David * 503 Murray from the bank was the money of the corporation; and secondly, that William Murray knew this to be the fact; but thirdly, if the notice under which he took was not actual, at least it was constructive, that the money was that of the corporation, and had it been a *chose in action*, beyond all doubt the assignee would have taken subject to all the equities of the assignor: *Bridgman v. Green*, (b) the following passage from Lord Chief Justice WILMOT's judgment in which case was cited by Lord ELDON in *Huguenin v. Baseley*: (c) "There is no pretence that Green's brother or his wife was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money? No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it." Here D. Murray was a defaulter and known to be such by William Murray when he took the money, and under these circumstances the money so obtained continued subject to the plaintiffs' claim. *Lupton v. White*, (d) *Pennell v. Deffell*, (e) *Har-*

(a) 5 H. L. Cas. 856.

(d) 15 Ves. 432.

(b) 2 Ves. 627.

(e) 4 De G., M. & G. 372.

(c) 14 Ves. 273; see p. 289.

ford v. Lloyd. (a) The case of *Maure v. Harrison* (b) is a clear authority, to show that as bond creditors the plaintiffs were entitled in equity to have the benefit of all collateral securities given by the principal to the surety. Here, however, the legal liability has been established against Renton, and if he were here

* 504 he could * not, neither could his executor, be heard to say a word against the decree.

Mr. Rolt and *Mr. Lewin*, for the executors of William Murray. — If there was ever any liability at all in William Murray, he can be only jointly liable with Renton; and the executors of William Murray are therefore clearly entitled to contribution, and to have Renton's representative made a party to the record. *Chamley v. Lord Dunsany*, (c) *Fussell v. Elwin.* (d) It was said, that William Murray knew the money was corporation money, but in his answer he positively denies any such knowledge, and the *onus* lies on the plaintiffs to prove such knowledge. It is in evidence that D. Murray was often in advance to the corporation, and his engagement contemplated his having the moneys of the corporation in his hands to make interest of during his tenure of office. We admit that at one time he owed the corporation 3000*l.*, but it does not follow that every item paid into the bank after that item was corporation money; but the rule in *Clayton's* case, cited in *Pennell v. Deffell*, (e) is applicable with reference to all payments and drafts, and the corporation can only take what they can prove to be corporation money. It was argued that the plaintiffs were entitled to the benefit of all securities in the hands of the surety, but it is equally clear that the surety has all the rights of the creditor, both at law and in equity. In the words of Sir W. GRANT in *Wright v. Morley*: (g) "I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to the surety, the surety has full as good an equity

* 505 * to the benefit of all the securities the principal gives to the creditor."

They also referred to *Hungerford v. Hungerford*, (h) *Nisbet v.*

(a) 20 Beav. 310.

(b) Eq. Ca. Ab. 93.

(c) 2 Sch. & Lef. 690; see p. 710.

(d) 7 Hare, 29.

(e) 4 De G., M. & G. 372.

(g) 11 Ves. 12; see p. 22.

(h) Gilb. Eq. 69.

Smith, (a) Lee v. Rook, (b) Penny v. Foy, (c) Pitman on P. and S., pp. 125, 126.

Mr. Toller appeared for the defendant Oswald, one of the sureties, and commented upon the length of the pleadings, referring to the 122d order of 8th May, 1845.

The Attorney-General, in reply. — As to the necessity for having Renton's representative before the Court, it can only be on one of two grounds, either for the purposes of the plaintiffs or of the defendants. He is not required by the plaintiffs, and it is immaterial as regards the defendants, who cannot have contribution in this suit. But if such representative were a necessary party to the suit, this Court may, under the 44th section of the Act 15 & 16 Vict. c. 86, either proceed in the absence of such representative, or appoint some person to represent the estate for all the purposes of the suit. The case of *Fussell v. Elwin (d)* is clearly distinguishable, inasmuch as there the obligees were originally all sued, and one having become bankrupt, the suit became defective, though the bankrupt remained still on the record, whereas if he had died he would have been struck off the record.

December 24.

The Lord Chancellor, after stating the facts as above given, and referring to the judgment in the House * of * 506 Lords, conclusively establishing the plaintiffs' claim against the sureties, proceeded as follows: The liability of the sureties being thus conclusively established to the extent of their bond, the order to be now made must be in conformity with that decision and the finding of the Master. David Murray must be ordered to pay the 3368*l.* 3*s.* 4*d.* found due from him, together with all the costs of the suit in equity, and the plaintiffs must be at liberty to sue out execution on their judgments, to make good whatever they may not recover from David Murray, together with their costs at law.

This disposes of the original suit.

The important question raised in the argument before me related, not to the original, but to the supplemental suit; and the

(a) 2 Bro. C. C. 581.

(c) 8 B. & C. 11.

(b) Moseley, 318.

(d) 7 Hare, 29.

question now to be decided is, whether the plaintiffs have made out that the 2300*l.* did in fact constitute part of their money, and if it did, then whether that was known to the defendant William Murray when he obtained from David Murray the accountable receipt.

The plaintiffs, in order to make out the first proposition, namely, that the sum in question was their money, rely on the following circumstances: —

David Murray, soon after his appointment as treasurer in December, 1841, namely, in April, 1842, opened a banking account with the British Linen Company, at their branch bank at Coldstream. That account was opened by him under the designation of Mr. David Murray for Berwick corporation. It was continued for somewhat more than two years, but in July, 1844, David Murray ceased to keep his banking account with that firm, and * 507 opened an account with the Berwick branch of the * Newcastle Union Bank, and in that account he was described David Murray, treasurer of the corporation. He continued this account from July, 1844, till the end of October, 1847, when that bank suspended its payments, and in November, 1847, he opened an account with the Eyemouth branch of the Commercial Bank of Scotland. In this account, when it was opened, the bank described him as David Murray, treasurer of the corporation of Berwick. But this designation was added to his name without his sanction, and three or four days after the account was opened, the words "treasurer of the corporation of Berwick" were by his direction struck out. The first item in this account was a sum of 300*l.* paid in by David Murray on the 8th November, 1847. No payments were made to the credit of this account after the 12th June, 1848, David Murray having ceased to be treasurer on the 24th of that same month of June. From the time when the account was opened up to its close twenty-two payments were made to its credit, amounting in all to 6630*l.* 15*s.* 9*d.* It was from this account that the 2300*l.* was taken. It was drawn out by David Murray on the 16th August, and was on that day deposited by him in the branch of the British Linen Company's Bank at Dunse in the name of his son William Smith Murray, then a lad of seventeen or eighteen years of age, on a deposit receipt taken by the father in his son's name, carrying interest.

On the 29th day of that same month, David Murray having pro-

cured the indorsement of his son to the receipt, sent it to the bank by a man of the name of Dodds, who obtained the money by means of the indorsed receipt, and immediately afterwards, according to directions previously given to him by David Murray, redeposited it in the name of Jane Johnston Murray, a daughter of David, and who was of the age of twenty-three years * or there- * 508 abouts. It does not appear that the bank were aware of the fact that William Smith Murray was a minor; but it seems pretty certain, that, after the first deposit, David Murray thought he might be embarrassed by having the money in the name of a minor, and therefore took an early opportunity of getting it placed in the name of his daughter, who was of an age enabling her legally to deal with it.

On these facts the inference appears to me to be irresistible, that this money was part of the corporation money, which had come to the hands of David Murray as their treasurer. It was hardly possible that he could discharge his duties as treasurer without keeping a banking account. The annual revenues of the corporation exceeded 8000*l.*, besides which large capital sums received by way of loan, and on sales, passed through his hands from time to time. I collect from the report of the committee of finance, made to the council of the borough on the 30th November, 1846, and afterwards adopted by the council, that it was part of the agreement between David Murray and the council that he should always have a considerable balance in his hand, of which he should be at liberty to make interest for his own profit. This almost necessarily supposes the keeping of a banking account; and in exact conformity with this probability, we find that David Murray did, in April, 1842, less than four months after his appointment, open a banking account, which he kept first with a branch bank of the British Linen Company, next with the Berwick branch of the Newcastle Union Bank, and lastly, with the Eyemouth branch of the Commercial Bank of Scotland. In the two first accounts which were continued from April, 1842, to October, 1847, the account was expressly earmarked, as being the account kept by him as treasurer; and though this was not the case with * respect to the third account, yet it must be taken * 509 that this account was but a continuation of those which had preceded it. There is a difficulty in tracing into any of these accounts the exact sums received by the treasurer from time to

time, for his course seems to have been not to pay into the bank by any means all sums received by him, but only those for which he did not think it likely there would be any immediate demand on him. The payments into the bank, and the drafts upon it, were generally made in round sums, not being apparently the exact sums received by him as treasurer, but even sums which from time to time he thought he might conveniently deposit, or which, on the other hand, he thought it prudent to draw out, in order that he might have cash in hand. There are, however, in the last account, *i.e.*, the account kept at the Eyemouth Branch Bank, from which the 2300*l.* was drawn out, three sums paid, in which were certainly sums specifically received by him as treasurer, namely, 3000*l.* paid in on the 13th January, 1848, 90*l.* 7*s.* 6*d.* paid in on the 18th February, 1848, and 125*l.* 14*s.* 8*d.* paid in on the 15th May, 1848. These three sums are all found in the accounts of David Murray with the corporation, which, as I have already stated, were audited up to the 1st March, 1848.

The first 3000*l.* was a sum borrowed for the erection of a new jail; the second 90*l.* 7*s.* 6*d.* was one year's bridge money received from Adam Burn, and the last 125*l.* 14*s.* 8*d.* was a balance of rent received from Patrick Clay. Finding, therefore, that several of the sums paid in to this account were certainly money of the corporation, and that this account was opened in continuation of an account which was an account avowedly kept by him as treasurer, and considering that it was his duty to keep the corporation money separate from any funds of his own,¹ if

* 510 he possessed any such funds, and * looking to the evidence as to the circumstances of David Murray, which were not such as to make it probable he would keep any banking account for his own private purposes, I think the only reasonable conclusion is, that this, like the two preceding accounts, was an account which David Murray kept as treasurer, and that the money of which it consisted was the money of the corporation. The correctness of this conclusion has been confirmed by what has subsequently transpired, for we find that he certainly had no funds of his own, having soon after he was discharged from his post of treasurer, fled from the country indebted, as it has since proved to the corporation, to an amount largely exceeding the balance to his credit at the bank before he withdrew the 2300*l.*

¹ See Story, Agency, § 208; 3 Lead. Cas. in Eq. (3d Am. ed.) 475.

The first proposition of the plaintiffs is, therefore, as I think, made out. This 2300*l.* must be considered as money of the corporation, in the hands of David Murray, as their treasurer.

The remaining question is, Have the plaintiffs made out that William Murray, when he obtained the deposit note, knew that the money was the money of the plaintiffs?

William Murray denies any such knowledge. He says, "That on or about the 29th of September, 1848, this defendant received a letter from Thomas Gilchrist, the town clerk of Berwick-upon-Tweed aforesaid, in the words and figures following, that is to say: Berwick, September 29th, 1848. Sir,—I am directed by the town council of Berwick to apprise you, as one of the sureties of Mr. David Murray, that he is now indebted to the corporation in a sum considerably exceeding the amount for which, by your bond, you rendered yourself * responsible; and that * 511 though required to account to the town council, and duly ordered to pay the balance so due by him, he has refused to do either. The town council think it right you should be made aware of this officially before the bond is put in suit. I am, &c." Then he says: "The said letter was the first or only notice given to this defendant of the dismissal of the said David Murray, or of his being indebted to the plaintiffs, and that upon receipt of the said letter, this defendant called upon the said David Murray and asked for an explanation, when the said David Murray stated that he had sufficient means to meet any demand against him, but that his refusal to quit the office held by him under the said corporation arose from his having been advised that he had not been legally discharged from the said office, and that this defendant thereupon insisted on the said David Murray giving this defendant some security, by way of indemnity, against any moneys which this defendant might have, or be called upon to pay, as the surety of the said David Murray; and that, accordingly on or about the 30th September, 1848, being more than a month before the filing of the original bill, the said David Murray agreed to give this defendant the required security; and that the said David Murray, on or about the said 30th September, 1848, delivered to this defendant a deposit receipt on the branch bank of the British Linen Company at Dunse, in the county of Berwick, in Scotland, for the sum of 2300*l.*, which had been deposited in the said bank by Jane Johnstone Murray, and the said deposit receipt was after-

wards indorsed by the said Jane Johnstone Murray, and that in the month of March, 1849, this defendant delivered the said deposit receipt to the said branch bank at Dunse, and received the money due upon the said deposit receipt, and placed the amount in his own name with his own banker, viz., the agent of the

* 512 Commercial Bank of Scotland, at Eyemouth, * in Scotland, on the 15th March last, and that the sum of 2235*l.*, part thereof, still remains there to the credit of this defendant, 65*l.* having been withdrawn." He submits, that he is entitled to hold the sum of 2235*l.* as such security. He adds, that at the time when the deposit receipt was delivered, he believed that the sum of 2300*l.* was the proper moneys of David Murray, and that he (the defendant) had no notice, that any part of the moneys was the property of the plaintiffs; and the defendant insists, that, in fact, no part of the moneys was the property of the plaintiffs; that David Murray, before he was appointed to the office of land steward to the plaintiffs in the year 1840, held the office of teacher of the parish school of Mordington, in Scotland, and collected the rents of that parish, and was agent to some gentlemen in the neighbourhood; and was also the occupier of a farm, and was considered by his neighbours a person in good circumstances, and that the defendant had not, at any time afterwards, reason to believe that the circumstances of David Murray had changed for the worse; and, in particular, that he the defendant had never any reason to believe or suspect that the sum of 2300*l.* did not properly belong to him. I must observe, that this is rather a guarded statement. He says he believed that the 2300*l.* was the proper money of David Murray, and had no notice that any part of it was the property of the plaintiffs. In a sense it might be very true, that he believed the 2300*l.* to be the proper money of David Murray; in fact, that though standing in the name of his daughter, it was not her money, but his; i.e., his as between himself and his daughter. So, again, it may be very true, that he had no notice that any part of the money was the property of the plaintiffs. But were not the circumstances such as must have forced an honest man to make inquiry? He had just received

* 513 formal notice * that David Murray, for whom he had become surety, had refused to account, or to pay the balance due from him. Nothing could be more reasonable than that he should immediately apply to David Murray for indemnity. But when, by

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way of indemnity, he was offered a deposit note made a month previously by David Murray in the name of his daughter, a young woman of twenty-three years of age, it is impossible that suspicion should not have been excited. He was bound to ask why such a deposit was made not in David Murray's own name, but in that of his daughter. It is not alleged, that he was ever led to suppose the daughter had any beneficial interest in the money; for what purpose then was her name used? In fact, her name was evidently used as a means of disguising the truth. Perhaps inquiry might not have brought out the truth; but it does not lie in the mouth of William Murray to say this. He made no inquiry, although the circumstances were such as ought to have induced him to do so. He knew that the corporation alleged great misconduct and default against David Murray. If he had applied to the daughter he would probably have learned from her that she knew nothing of the deposit till she was called on by her father to indorse the deposit note; that it was made without any previous communication with her; and that she was never possessed of any such sum as 2300*l*. It is impossible to permit a man who received, by way of security from a defaulting agent, a deposit of money which had been withdrawn from the funds of his principal, to insist in circumstances like these on his ignorance of the truth. I am clearly of opinion, that William Murray must be treated as a person who had notice of the truth. The consequence is, that as against William Murray's executors, the plaintiffs have made out their title to the relief they ask, and they must have a decree with costs. The other sureties, Renton and Oswald, were necessary * parties to the suit, but they were not privy to * 514 the appropriation of the money, and the plaintiffs must therefore pay them their costs, which they must receive over from William Murray's executors.

It was objected by the counsel for William Murray's executors, that the case could not proceed in the absence of a representative of Renton, who died in the month of February, 1856. At the time of the argument I was not inclined to concur in this view of the case, but further reflection has satisfied me that I ought to require him to be represented. He concurred with the other sureties in paying into Court the 500*l*. ordered to be brought in by the Lords Justices, and as I must provide for the distribution of that fund, it is impossible for me in his absence to make a decree in the sup-

plemental suit. In the original suit the whole question, both as to liability and amount, had been finally decided in Renton's lifetime. Still, as the effect of this decree is to enable the plaintiffs to proceed to execution on their judgments, I incline to think it would have been necessary for him to be represented, but it is not necessary to decide this. As the decree which I propose to make will give to Renton's representatives, as well as to Oswald, the costs of the supplemental suit, I will at once, if such a course is approved, appoint Oswald to represent the estate of Renton for the purposes of these suits, and, if that is acceded to, the decree may be made at once. If that is not consented to by Oswald the causes must stand over, and the plaintiffs must procure some one to represent Renton for the purposes of these suits.

It was contended in argument, that the evidence, both in the original and in the supplemental cause, had been unnecessarily prolix and expensive. I shall in my decree point the attention of the taxing master to this, * and direct him, not only to disallow on taxation the costs of any evidence he may find to have been unnecessary, but to allow to the parties ordered to pay the costs, whatever additional costs they may have been put to by such unnecessary prolixity.¹

If Oswald assents to what I have suggested, the decree will be to the following effect: —

There must be a declaration that David Murray is bound to pay to the plaintiffs the sum of 3368*l.* 3*s.* 4*d.*, found due by the Master's report, together with interest at 5*l.* per cent from the date of the report, together with the costs of the original suit, which must be taxed accordingly.

I shall not order the costs of the original hearing, or of the rehearing in 1852, to be paid by the sureties.

It must be declared that the 2300*l.* deposited with William Murray was the money of the plaintiffs, in the hands of David Murray, their treasurer.

The funds in Court arising from the investment of the 2300*l.* and 500*l.* must be sold, and so much of the proceeds as has arisen from the investment of the 2300*l.* must be paid to the plaintiffs in satisfaction *pro tanto* of the 3368*l.* 3*s.* 4*d.*, and of the interest thereon from the day when the 2300*l.* was paid into Court.

¹ See 1 Dan. Ch. Pr. 837, 1394.

William Murray's executors must be ordered to pay to the plaintiffs, in further satisfaction of what is due to them from David Murray, interest at 5*l.* per cent on 2300*l.* from the 6th March, 1849, to the time when the 2300*l.* was paid into Court, the Attorney-General, on behalf of the plaintiffs, having agreed not to contend for * interest from an earlier day than the 6th * 516 March, 1849, and the plaintiffs must be at liberty to take out execution on their judgments in order to satisfy themselves the balance due to them from David Murray, together with their costs at law; and so much of the money produced by sale of the funds in Court as has arisen from the investment of the 500*l.* must be paid to the plaintiffs in part satisfaction of the judgments.

Tax the plaintiffs and defendants, Renton and Oswald, their costs of supplemental suit. Let the plaintiffs pay to Oswald, in his own right, and as representing Renton's estate, what shall be found due to them for such costs; and let the defendants Dobie and Custans, the executors of William Murray, pay to the plaintiffs their costs, including what they shall so pay to Oswald.

Let the taxing master, in taking the costs, not only disallow the expense of so much, if any, of the pleadings and evidence as he shall consider to have been unnecessary, but also allow to the defendants, Dobie and Custans, the extra expense, if any, occasioned to them or to their testator thereby.

Mr. Rolt and *Mr. Lewin*, on behalf of the defendants Dobie and Custans, the executors of William Murray, asked that there might be a declaration in the decree that all the defendants should contribute equally. *Latouche v. Lord Dunsany.* (a)

The Lord Chancellor desired that the case might be mentioned on the first day of Hilary term on that point, and also on the point as to whether the defendant * Oswald would con- * 517 sent to represent the deceased defendant Renton for the purposes of the suit.

January 12.

On this day *Mr. Rolt* and *Mr. Lewin* renewed their application for a declaration that all the defendants were equally liable to con-

tribute, and, in addition to the authority of *Latouche v. Lord Dunsany*, (a) cited *Lawson v. Wright*: (b) they also submitted that the rate of interest to be charged against the sureties should be 4l., and not 5l. per cent.

THE LORD CHANCELLOR. — I do not know, nor is there any evidence before me, that all the defendants are equally liable. The case of *Latouche v. Lord Dunsany* (a) does not appear to me to have any bearing on what is asked as to a declaration of equal liability; and in *Lawson v. Wright* (b) the question of liability was distinctly raised in the pleadings.

Mr. Craig and *Mr. Greenside*, for the plaintiffs, submitted that the decree charging interest at the rate of 5l. per cent against William Murray, who must be regarded as standing in the shoes of his defaulting principal, was quite in accordance with the inviolable practice of the Court, and asked for time to produce authorities on the subject, as the proposed variation of the decree on that point had taken them by surprise.

It being intimated to the Court that the defendant Oswald had declined to represent the deceased defendant Renton for the purposes of the suit, —

* 518 *The Lord Chancellor said: I shall not dispose of the case without having a personal representative of Renton before the Court, and though it is not the plaintiffs' fault that there is not one, yet, as it is their business to procure one, they must do so.

I am clearly of opinion that if an agent fraudulently retains money he must be charged with interest at the rate of 5l. per cent, but as the question has not been argued before me whether William Murray ought to be charged with 4l. or 5l. per cent on the balance, or whether more is to be paid on the 2300l. than what has been received, I will give liberty to have that point argued. The 500l., which has been paid into Court by the three sureties, is to go in redemption of the bond.

(a) 1 Sch. & Lef. 137.

(b) 1 Cox, 275.

March 7.

On this day *Mr. Rolt* and *Mr. Lewin* contended that the rate of interest to be ordinarily charged as against a defaulting trustee was 4*l.* per cent, and that the rule of the Court was to fix him with 5*l.* per cent only in cases where he has made use of the money; otherwise it might be asked, as was said by his Lordship in *The Attorney-General v. Alford*, (a) why not punish an executor by making him account for more principal than he has received, if he is to be punished by having to account for more interest than he has received? *Rocke v. Hart*, (b) *Penny v. Avison*. (c)

Mr. Craig and *Mr. Green-side*, contra.—In the case of *The Attorney-General v. Alford*, (a) your Lordship distinguished that case from those where a * trustee had been guilty of a * 519 gross breach of trust, and decreed that the trustee in the case then before you should only be charged with 4*l.* per cent, because there was no evidence that he had kept the money fraudulently in his hands, meaning to appropriate it. Here, however, it is plain that David Murray intended to appropriate the 2300*l.*, with a guilty knowledge that it was the money of the corporation.

They also referred to *Stackpool v. Stackpool*, (d) *Crackelt v. Bethune*, (e) *Mousley v. Carr*, (g) *Knott v. Cottee*, (h) *Blair v. Bromley*. (i)

Mr. Rolt, in reply.

THE LORD CHANCELLOR.—The law on the subject is very unsatisfactory, but if it is supposed, that, in *The Attorney-General v. Alford*, (a) I laid it down that a defaulting trustee could never be charged with more than 4*l.* per cent, that is quite a mistaken assumption of my meaning. In that case I thought that, though the trustee was chargeable with impropriety of conduct, yet that the circumstances of the case showed that it was impossible to impute to him an intention to appropriate the money to his own use. In such a case I expressed myself as clearly of opinion

(a) 4 De G., M. & G. 843.

(b) 11 Ves. 58.

(c) 3 Jur. N. S. 62.

(d) 4 Dow. 209.

(e) 1 J. & W. 586.

(g) 4 Beav. 49.

(h) 16 Beav. 77.

(i) 5 Hare, 542; S. C., 2 Phil. 354.

that the Court would be justified in dealing most rigorously, and charging the trustee with 5*l.* per cent, whether he had made it or not; and, applying that principle to the present case, I am bound to charge William Murray with interest at the rate of 5*l.* * 520 per cent on the sum of 2300*l.*, because *David Murray received the money in the character of a trustee, — he stood in a fiduciary relation with respect to it, and misapplied it, and I can see no distinction between him and William Murray, inasmuch as it was received from David by William under circumstances which have satisfied me that the latter knew it was the money of the corporation.¹

COORE v. TODD.

1857. January 28. March 26. Before the Lord Chancellor Lord CRAWFORTH.

A testator by his will devised certain real estate to trustees in fee in trust out of the rents to pay an annuity to A. B. until he attained twenty-five, when he was to be entitled to the possession of the estates, and an annuity of 400*l.* a year to C. D. for life, and an annuity of 150*l.* for the maintenance and during the minority of an infant tenant in tail; and “without prejudice to the trusts aforesaid,” and “to any jointure to be created under the power thereafter contained” to pay the surplus rent to the mother of A. B. until he should be entitled to the possession of the estates; and, “subject to the trusts aforesaid,” the trustees were to hold the estates in trust for A. B. for life, with remainder to his eldest son in tail, with power to A. B. to appoint a jointure to any wife, with the usual powers of distress and entry, to take effect immediately after his decease. A. B. having appointed the jointure died, leaving his widow, who gave birth to a posthumous son, the infant tenant in tail. The income of the estates proving deficient, *held*, that the annuity of 400*l.*, the jointure and the annuity for the maintenance of the infant tenant in tail must abate *pari passu*, but that the apportionment was not to be retrospective, so as to affect the amount received by C. D. previously to the birth of the tenant in tail.

THIS was an appeal by the plaintiff Richard Coore from the decree of the Master of the Rolls. The case is reported in the twenty-third volume of Mr. Beavan's Reports, p. 92.

¹ See *Burdick v. Garrick*, L. R. 5 Ch. Ap. 233.

The following short statement taken from the Lord Chancellor's judgment will suffice for the purposes of the present report. The question arose under the will of John Blagrove, dated the 3d February, 1824, whereby he devised certain real estates in the West Indies to trustees in fee, on trust to manage, and subject thereto, and to raising certain annual and gross sums of money, in trust, so long as Henry Coore, the second son of his daughter Isabella Coore, should be under twenty-one, to apply 150*l.* per annum for his maintenance and education, and after *twenty- * 521 ty-one, and up to twenty-five, in trust to pay to him 300*l.* per annum; and so long as Richard Coore, the third son of Isabella, should be under twenty-one, to apply 150*l.* per annum for his maintenance and education, and after twenty-one, and up to twenty-five, in trust to pay him 300*l.* per annum, and after twenty-five 400*l.* per annum till he should become entitled to the rents and profits. The testator directed that so long as any tenant in tail male in possession should be under twenty-one he should have a competent annual sum not exceeding 150*l.* for maintenance; and until one of the grandsons or their issue male should be entitled to the possession, the residue was to be paid to his daughter Isabella, "without prejudice to the trusts aforesaid" and to any jointure to be granted under a power thereafter contained. The testator provided, that in case Isabella should be living when either of the grandsons or their issue male should become entitled in possession, then in trust to pay to her 1000*l.* per annum; and after the decease of Isabella, and while either of the grandsons or their issue should be entitled in possession, upon trust to accumulate the rents, and at the end of the accumulation to pay the same to the person entitled for the time being to the rents. The testator also directed, that when the tenant for life should attain twenty-five, he should be let into possession of the rents, subject and charged as aforesaid; and "subject to the trusts aforesaid," in trust for Henry for life, with remainder to his first and other sons in tail male in default of such issue, in trust for Richard for life, with remainder to his first and other sons in tail male. The will contained a power to Henry, after attaining twenty-one, and after his decease without issue male, for Richard, on attaining twenty-one, to limit a jointure not exceeding 300*l.* per annum to be charged on the premises; not more than one jointure to be payable at the same time.

* 522 * Henry exercised his jointuring power in 1850, and died in March, 1854. His widow, in July, 1854, gave birth to a posthumous child, a son.

Richard attained twenty-five in July, 1848, and his annuity of 400*l.* per annum was paid up to April, 1854. The rents of the estate having become insufficient to pay the several annuities and the jointure in full, a claim was filed by Richard Coore against the trustees, the jointress, and the infant tenant in tail, to have the priorities and rights of the parties ascertained and declared. The Master of the Rolls having decreed that the annuities and jointure must abate *pari passu*, the plaintiff Richard Coore now appealed to the Lord Chancellor.

Mr. Lloyd and *Mr. Nalder*, in support of the appeal. — It is clear that the testator must have intended the annuity of 400*l.* to have priority over the jointure and the annuity of 150*l.*, the former being an incident of the life-estate of Henry Coore, and being to issue out of the estate limited in tail male, which was expressly declared to be “subject to the trusts aforesaid;” and the latter being to issue out of the estate tail, which is also subject to the annuity of 400*l.* previously given to the appellant.

Mr. Haynes (*absente Mr. R. Palmer*), for Isabella Coore, the jointress, *contra*. — It is submitted that the decision of the Master of the Rolls is not sufficiently favourable to the jointress, and that she is entitled to a priority; but, at least, she is not to be postponed to any one of the annuitants. *Beeston v. Booth*, (a) *Thwaites v. Foreman*. (b)

* 523 *Mr. Selwyn* and *Mr. Mackeson*, for the infant tenant * in tail, submitted that, in the absence of any proof to the contrary, equality was intended; and that, under the circumstances which had arisen, but were not anticipated by the testator, there must of necessity be a ratable abatement. They referred to the language of Lord TRURO in *Miller v. Huddleston*, (c) where his Lordship said: “The rule is, that, in case of a deficiency, all the annuities and legacies abate ratably; for, since they cannot all be paid in full, they shall all abate ratably, on the principle of the

(a) 4 Mad. 161.

(b) 1 Coll. 409.

(c) 3 Mac. & G. 513 [and n. (3)], see p. 523.

maxim, 'equality is equity,' or 'equity delighteth in equality;' . . . but it is settled that the *onus* lies on the party seeking priority to make out that such priority was intended by the testator, and that the proof of this must be clear and conclusive."

Mr. Nalder, in reply.

The Lord Chancellor, at the conclusion of the argument, — observing, that it would be very desirable to arrive at the same conclusion as had been adopted by the Master of the Rolls, as it appeared to be the reasonable construction, — said he would dispose of the appeal at a future day.

March 26.

The Lord Chancellor, after stating the facts as above set forth, proceeded: The question is, whether the 400*l.* per annum, the 300*l.* per annum, and the 150*l.* per annum, are to abate ratably. The Master of the Rolls held that they must so abate, and I concur. I do not think that the doctrine of *Beeston v. Booth* (a) or *Thwaites v. Foreman* (b) is * closely applicable. The * 524 question here is, so far as relates to the jointure, whether the property charged with the jointure is the same as that charged with the 400*l.* per annum, or the rents and profits, after first deducting the 400*l.* per annum.

The appellant argued, very forcibly, that it was strange that the 400*l.* per annum should have precedence over the life-estate of the elder brother, but that when he died it should only come in *pari passu* with the jointure of his widow. It would not have been so if the widow had had a life-interest in the whole instead of a mere rent-charge.

No doubt this is an anomaly arising from the circumstance that the testator did not contemplate the great falling-off in the value of the estate. But it is only one of many other anomalies; the testator certainly meant to give a larger interest to Henry than to Richard. This, however, was defeated by the falling-off of the rents; and other anomalies may easily be pointed out. But the question is, whether, when the jointure became payable, it was not to be treated as a rent-charge or annuity given by the testator,

(a) 4 Mad. 161.

(b) 1 Coll. 409.

just as the others are given, and so as to the 150*l.* for maintenance of the infant tenant in tail. I think they are. That is the general rule ; and though probably this is not the arrangement which the testator would have made if he had foreseen the great falling-off of his fortune, yet it is what he has said. The Court cannot speculate on what he would have done if he had foreseen what he did not foresee. He has given directions applicable to a state of things as they existed at his death, and the Court cannot alter the directions he has given, because it thinks it unlikely he would have made them if he had foreseen what has happened.

* 525 * The decree, however, must be varied, though not substantially, so as to show that the payments of the 400*l.* per annum, up to the time when the other sums became payable, have been properly made ; for there can be no retrospective apportionment, and here the case differs from *Beeston v. Booth*. (a) The costs must come out of the estate.

ALEXANDER v. BRAME.

1855. July 2, 3, 31. Before the LORDS JUSTICES, Mr. Justice WIGHTMAN, and Mr. Justice ERLE.

An instrument under seal contained a covenant with trustees that the covenantor in his lifetime or his executors within twelve months after his decease would invest 60,000*l.* in the names of trustees upon charitable trusts. It was executed by the covenantor, but was not communicated to the trustees.

Held, —

1. That it was a deed, whether it was also testamentary or not.
2. That it was not invalid as infringing the provisions of the Statute of Mortmain.¹

THIS was an appeal from the decision of the Master of the Rolls, directing an action to be brought to determine questions of law arising under the following circumstances : —

By an indenture dated the 12th August, 1846, and expressed to be made between Benjamin Brame of the one part, and Jeremiah Head, John Biddle Alexander, Simon Batley Jackaman, and Wil-

(a) 4 Mad. 161.

¹ See *Myers v. Perigal*, 2 De G., M. & G. 599, n. (2), and cases cited.

liam Henry Alexander of the other part, Benjamin Brame covenanted with the other parties to the deed that his executors or administrators should, within twelve calendar months after his decease, and out of his estate, pay certain sums to and for the benefit of certain persons therein named, if living at his decease, to be invested in the names of the covenantees on the trusts therein mentioned.

By another indenture of even date, and executed by Benjamin Brame alone, but expressed to be made between Benjamin Brame of the one part, and W. H. * Alexander, F. Alexan- * 526 der, and G. Alexander of the other part, it was recited that the said B. Brame was desirous of founding the three charities thereafter mentioned for certain poor belonging to and residing in the several parishes in the borough of Ipswich, and for that purpose was desirous of settling and assuring a part of his personal estate upon the trusts and for the purposes thereafter expressed or declared and contained of and concerning the same.

The operative part was as follows: "Now this indenture witnesseth, that, in pursuance of the said desire of the said B. Brame in that behalf, and for divers other good causes and considerations him thereunto moving, he the said B. Brame, for himself, his heirs, executors, and administrators, doth by these presents covenant, promise, and agree with and to the said W. H. Alexander, F. Alexander, and G. Alexander jointly, and each of them severally, their and his respective executors and administrators, that he the said B. Brame shall and will in his lifetime, and within the space of twelve calendar months next after the day of the date of these presents, lay out and invest at interest the sum of 60,000*l.* of lawful money of Great Britain in the names of Jeremiah Head, John Biddle Alexander, Simon Batley Jackaman and the said William Henry Alexander, or in the names or name of the survivors or survivor of them, or of the executors or administrators of such survivor, in the government or parliamentary stock or fund of Great Britain called the £3 per centum consolidated annuities; or in case the said B. Brame shall not in his lifetime lay out and invest the said sum of 60,000*l.* as aforesaid, that then the executors or administrators of the said B. Brame, within the space of twelve calendar months next after his decease, and subject and without prejudice to the payment and discharge by, with, or out of the estate of the said * B. Brame of all * 527

the funeral and testamentary expenses and other debts of the said B. Brame, and the legacies (if any) given or bequeathed, or hereafter to be given or bequeathed, by his will or any codicil or codicils thereto, and of all annuities (if any), given, bequeathed, or settled, or hereafter to be given, bequeathed, or settled by the said B. Brame by his will, or any codicil or codicils thereto, or by any deed or deeds, or instrument or instruments in writing under his hand and seal, do and shall lay out and invest at interest the sum of 60,000*l.* of lawful money of Great Britain in the names of the said Jeremiah Head, John Biddle Alexander, Simon Batley Jackaman, and William Henry Alexander, or of the survivors or survivor of them, or of the executors or administrators of such survivor, in the said parliamentary stock or fund of Great Britain, called the £3 per centum consolidated annuities, to and for the end, intent, and purpose that the said £3 per centum consolidated annuities, so to be purchased as aforesaid, shall and may henceforth be held and possessed upon the trusts and for the purposes hereinafter expressed or declared."

By the declaration of trust therein referred to, the trustees were directed to pay certain sums to the incumbents and church-wardens of the several parishes of Ipswich, to provide for weekly distributions of bread for the poor; and subject thereto, upon trust to stand possessed thereof in trust to pay to Jeremiah Head, John Biddle Alexander, Simon Batley Jackaman, and William Henry Alexander, and the survivors, and to the incumbent of St. Mary-at-the-Key, in Ipswich, and four of the trustees of a charity called Tooley's Charity, all the dividends of the above sum of stock, upon trust that the last-mentioned persons, and after the decease of the four first named, then that the said incumbent and all the trustees of Tooley's Charity should distribute the same weekly among the poor of Ipswich.

* 528 * On the day of the date of these two deeds, Benjamin Brame executed his will, whereby, after making certain devises and bequests, and giving charitable legacies out of such part of his personal estate as should not consist of chattels real, he appointed Jeremiah Head, John Biddle Alexander, and Simon Batley Jackaman his executors, and gave each of them a legacy of 50*l.* as a small remuneration for their trouble in the execution of his will and other trusts which he had reposed in them.

By a codicil dated 20th November, 1848, the testator appointed

T. B. Ross an executor in the place of Jeremiah Head, and directed that he should be a trustee, with the other trustees, in the execution and management of the charitable trusts created by a deed executed for that purpose. Neither the will nor the codicil contained any residuary bequest.

On the testator's death, which took place on the 21st July, 1851, the two deeds, together with the will and codicil, were found in an envelope, with the following memorandum in the testator's handwriting, and signed with his initials, and indorsed as follows in the testator's handwriting: "Enclosed are the two deeds respecting the disposition of my property, and my will. 12th August, 1846:" "It will be seen that the drafts of the two deeds of covenant are prepared by Mr. Ram. There will not be so much as 60,000*l.* to invest, I calculate about 50,000*l.*, but he recommended a larger sum to be inserted than would be the amount of the assets, which would carry the principal moneys after the annuities had ceased, as also the residue (if any) over and above what I have given by will. The object of the deeds of covenant was to save the large sum which would otherwise have to be paid for legacy duties, and it was apprehended that if any part had to pay probate duty in the first instance, the * duty might be got back again in consequence of the deeds * 529 of covenant creating a debt to be paid out of the assets.

Mr. Ram considered that, although the covenant is to place out in the three per cents a sufficient sum to pay the annuities, yet there would be no objection to let a sufficient sum remain of the mortgages for those purposes, from which better interest could be obtained than buying into the funds. It is my wish that J. Legger, my late servant, and J. Purssey may be placed as recipients for the 7*s.* a week. B. B. 11th August, 1846."

The value of Mr. Brame's personal estate at his death was about 70,000*l.*, and the value of the portion of it, consisting of pure personalty, was not more than 20,000*l.*

The Master of the Rolls held, that the first deed was valid, and created a debt against the testator's estate for the several sums covenanted to be paid and invested, but his Honor directed an action to be brought by the plaintiffs to try the validity at law of the second deed. The case is reported in the nineteenth volume of Mr. Beavan's Reports. (a)

(a) Page 436.

From this decision the next of kin appealed, and the appeal now came on to be heard before the Lords Justices, assisted by Mr. Justice WIGHTMAN and Mr. Justice ERLE.

Sir Fitzroy Kelley, Mr. Elmsley, and Mr. Speed, in support of the appeal.—First, this instrument, not a deed, but a will. Being testamentary, it is inoperative, as it is not duly attested.

Secondly, if the Court should be against us on this point,
* 530 * still the instrument, as a deed, is void for want of enrolment, according to the Mortmain Act.

They referred to *Fletcher v. Fletcher*, (a) *Uniache v. Giles*, (b) *Shingler v. Pemberton*, (c) *King's Proctor v. Daines*, (d) *Thorold v. Thorold*, (e) *Masterman v. Maberly*, (g) *Rigden v. Vallier*, (h) *Walsh v. Gladstone*, (i) *Woodbridge v. Spooner*, (k) *Habergham v. Vincent*, (l) *Consett v. Bell*, (m) *Way v. East*, (n) *Attorney-General v. Poulden*, (o) *Thornton v. Kempson*, (p) *Tyre v. Corporation of Gloucester*, (q) *Chaworth v. Beech*. (r)

Mr. Justice WIGHTMAN, in delivering the opinion of himself and Mr. Justice ERLE on the first point, said : It appears to us that this instrument is a deed. What the result of that may be we do not at present say. The instrument has all the requisites of a deed ; it is in the form of an indenture ; it is sealed and delivered by the covenantor in the presence of the attesting witness ; and the collateral circumstance, that it had been kept in the possession of the covenantor, does not render it less a deed.¹ No case has been cited showing that such an instrument is not a deed, whatever else it may also be. Whether it is any thing further we do not say.

(a) 4 Hare, 67.

(b) 2 Moll. 257.

(c) 4 Hagg. 356.

(d) 3 Hagg. 218.

(e) 1 Phillim. 1.

(g) 2 Hagg. 235.

(h) 2 Ves. 252.

(i) 13 Sim. 261.

(k) 3 B. & A. 233.

(l) 2 Ves. Jr. 204.

(m) 1 Y. & C. C. C. 569.

(n) 2 Drew. 44.

(o) 8 Sim. 472.

(p) 23 L.J. (Ch.) 977.

(q) 14 Beav. 173.

(r) 4 Ves. 565.

¹ *Perry Trusts*, §§ 103, 111 ; *In re Way's Trusts*, 2 De G., F. & S. 365 ; *Bunn v. Winthrop*, 1 John Ch. 329 ; *Souverbye v. Arden*, 1 John. 240 ; *Jones v. Obenchain*, 10 Gratt. 259.

The Lords Justices concurred, remarking, that this Court could not determine whether the document was a will or not, and their Lordships directed the counsel for * the respondents * 531 to confine their arguments to the second point.

The Solicitor-General, Mr. Roundell Palmer, Mr. Lloyd, Mr. Selwyn, Mr. Wickens, Mr. Rodwell, Mr. Hannan, and Mr. Grenside, for the respondents.

The nature of the arguments appear sufficiently from the judgments.

They referred to *Walker v. Milne*, (a) *Bligh v. Brent*, (b) *Myers v. Perigal*, (c) *Shadbolt v. Thornton*, (d) *Attorney-General v. Meyrick*, (e) *Collinson v. Pater*, (g) *Foone v. Blount*, (h) *March v. Attorney-General*, (i) *Hobson v. Blackburn*. (k)

After the arguments had been concluded, the learned Judges, who assisted the Lords Justices in hearing the case, gave their opinion in writing, which was as follows:—

“We are of opinion that the indenture of the 12th August, 1846, called the Charity Indenture, is valid in law, and not within the prohibition of the Statute 9 Geo. 2, c. 36, entitled ‘An Act to restrain the Disposition of Lands,’ whereby the same become inalienable, by the indenture in question, Benjamin Brame, now deceased, covenanted with the plaintiff and two other persons. [Here followed the statement of the effect of the covenant.]

“At the time of the execution of the deed, and from * thence to the time of his death in 1851, the bulk of the * 532 testator’s property consisted of chattels real; and neither he in his lifetime, nor his executors after his death, could have invested the 60,000*l.* in three per cent consols, in pursuance of the deed, without first selling, or otherwise disposing of the chattels real. On the same day that he made the indenture, he also made his will, by which he gave legacies to different persons, and also

(a) 11 Beav. 507.

(b) 2 Y. & C. 268.

(c) 2 De G., M. & G. 599.

(d) 17 Sim. 49.

(e) 2 Ves. 44.

(g) 2 Russ. & Myl. 344.

(h) Amb. 320, 767; Cowp. 464.

(i) 5 Beav. 438.

(k) 1 Myl. & K. 571.

made some bequests for charitable purposes, other than those mentioned in the indenture, to be satisfied out of such part of his personal estate, as did not consist of chattels real, and he appointed three out of the four persons, who were trustees under the indenture, to be executors of his will. By a codicil in 1848, he revoked the appointment of one of the executors in his will, and substituted Mr. Ross in his place.

“ It was contended for the defendant, that the deed was void, as being a contrivance, or part of a contrivance, to evade the Statute of Mortmain, and to charge or incumber real estate or chattels real for the benefit of charitable uses. We are, however, of opinion, that as far as we can judge of intention by acts, the object of Mr. Brame was to avoid infringing the Statute of Mortmain, and not to charge or incumber his chattels real for the benefit of charitable uses; and the indenture in question did not effect any such charge or incumbrance. By the first section of the 9 Geo. 2, c. 36, it is enacted, that no hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any per-

* 583 son or persons, * bodies politic or corporate, or otherwise for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever in trust, or for the benefit of any charitable uses whatsoever, unless, &c. One of the earliest and best expositions of the statute and its object is contained in the judgment of Lord HARDWICKE in the case of *Sorresby v. Hollins*. (a) In that case, a testator willed that his executors should settle and secure by purchase of lands of inheritance, or otherwise out of his personal estate, an annuity of 50*l.* for ever for charitable purposes. It was there contended, that, notwithstanding the words ‘ or otherwise,’ the testator’s intention was to assure the annuity out of lands of inheritance, but Lord HARDWICKE was of opinion, that the bequest was not void, if by law it could possibly be made good. ‘ The Act of Parliament,’ he says, ‘ is not at all aimed against perpetual charities as such, but is against

the cases of perpetual charities in lands, and as the title imports to restrain the disposition of lands whereby the same become inalienable, and there is no restriction upon any one from leaving a sum of money by will, or any other personal estate to charitable uses, provided it be continued as personalty, and the executors are not obliged or under a necessity of laying it out in land by virtue of any direction of the testator for that purpose,' and he held the devise to be good. There is no doubt, upon the authorities that were cited upon the argument, that if the indenture had purported to convey or settle, or in any way charge or incumber any of the chattels real of the settlor, it would have been void, at least so far. In *Collinson v. Pater*, (a) a bequest to charitable purposes, which included a debt secured by a judgment, was held to be within the statute and void, as the judgment was a charge upon the real estate of the debtor. In all the * cases, how- * 584 ever, as far as we are aware, it will be found that the devise or conveyance that was in question, whichever it might be, operated directly upon something which was a chattel real or charge upon real estate. In the present case, the indenture in question neither charges nor incumbers, nor professes to charge or incumber the real estates or chattels real of the settlor for charitable purposes. It merely contains a covenant by Mr. Brame, that he will, within twelve months, invest 6000*l.*, in three per cent consols, for charitable purposes, or in case he does not do so in his lifetime, that his executors will do so within twelve months after his death, subject to certain contingent charges. No particular fund is charged for the purpose of fulfilling the covenant, and if Mr. Brame thought it to his interest during his life to convert his chattels real into money, there was nothing in the deed to prevent him, nor his executors after his decease, from doing so. We do not think it necessary to give any opinion as to the covenant, being absolute upon the covenantor in his lifetime or alternative, to be enforced only, if at all, against his executors, as in our view of the case it is not within the Statute of Mortmain, whether it be an absolute or alternative covenant. The validity or invalidity of the deed must be determined by the circumstances existing at the time it was made. It neither charged nor conveyed any property real or personal. The circumstance that Mr. Brame's property at that time

(a) 2 Russ. & M. 344.

consisted chiefly of chattels real was an accident. He lived for five years after, and during all that time might have changed the character of his property in any way he liked, or parted with it altogether; and, after his death, his executors might have done the same. The covenantees would have been merely entitled to maintain an action against them for breach of covenant to invest the stock, if the executors, after twelve months from the death * 535 of the testator, had refused to do so, but they * would not at law have been entitled to call upon the executors to apply any particular description of assets to the satisfaction of their claim, but would have stood in the same situation as any other creditor suing for breach of covenant. We are, therefore, of opinion, that as the deed in question does not, and did not when made, operate as a charge or incumbrance on any real estate or chattels real for the benefit of any charitable use, it is not affected by the Statute of Mortmain, and is consequently valid."

July 31.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, one of the points raised by the appeal having been properly waived by the appellants, the only question remaining for decision here was that of the legal and equitable validity of the deed executed by the late Mr. Brame, which, if wholly valid at law and in equity, has effectually, by way of debt from him, subjected his assets to the payment of a large sum to be appropriated to charitable purposes. I call the instrument a deed, because — whether capable or not capable of being admitted to probate in the ecclesiastical jurisdiction (which it perhaps cannot, perhaps can be, but has not been) — whether transgressing or not transgressing the law — whether an instrument to have or not to have effect given to it in a Court of justice — it certainly is a deed, certainly is the deed of Mr. Brame; and against its validity, whether at law or in equity, the only suggestion or the only arguable suggestion is, that it falls within or is affected by the Statute 9 Geo. 2, c. 36.

For this proposition the appellants contend. The Master of the Rolls considering, as I collect, that it was valid in equity * 536 if — and was not unless — valid at law, and * that the point of its legal validity or invalidity was one on which the assistance of a Court of Law was desirable, directed an action accordingly. This may have been a perfectly correct course under the

circumstances, but when the appeal came on for hearing before us, the counsel on each side, with our assent, agreed that we should hear the point argued with the assistance of two Judges, and then determine it ourselves, without prejudice of course to the right of appeal to the House of Lords on the merits; and the matter was in consequence brought on and discussed before Mr. Justice WIGHTMAN, and Mr. Justice ERLE, and ourselves. Mr. Justice WIGHTMAN has since favoured us with his opinion, which, having the concurrence and agreement of Mr. Justice ERLE, may therefore of course be taken as the opinion of each of the two learned Judges. It is in these terms: [His Lordship read the Judges' opinion set out above.]

For this valuable assistance on the part of Mr. Justice WIGHTMAN and Mr. Justice ERLE we are very much indebted to them, and I deem it necessary to add but little, beyond saying that, on the authority of the case of *Foone v. Blount*, (a) which, though not a decision on the Statute 9 Geo. 2, c. 36, is not irrelevant, as well as on reason and principle, I agree with the learned Judges as to the legal validity of the instrument in dispute, and consider it likewise to be altogether good in equity. It is plain that for charitable purposes, such as those specified in the deed, Mr. Brame might well and effectually have made an immediate gift of money. It is plain also that for charitable purposes, for which a man may well and effectually make an immediate gift of money, he may, acting *bonâ fide*, make himself effectually a debtor of money by specialty without valuable consideration,¹ and * for motives merely of benevolence and beneficence; and * 537 it seems to me to follow and be manifest that payment of a debt so incurred may, on behalf of the charity, be enforced against the debtor, and his real as well as his personal estate by the same means, to the same extent and in the same manner as any other specialty debt fairly incurred, but not founded on valuable consideration. The Statute 9 Geo. 2, c. 36, cannot, I think, be deemed to have been intended to prevent or interfere with that.

If in the present instance there had appeared to me sufficient ground for holding that the deed in question was a device on the

(a) Amb. 320, 767; Cowp. 464.

¹ See *Kekewich v. Manning*, 1 De G., M. & G. 176, and cases in n. (1), 188 notes (1) and (2); *Stone v. Hackett*, 12 Gray, 227.

part of Mr. Brame for the purpose of evading and eluding the statute, by keeping seemingly and colourably clear of it, while meaning substantially to infringe it, I might very possibly have taken a view of this appeal favourable to the appellants; but whatever suspicions I may be disposed to entertain, there is not, in my opinion, judicial ground for so holding. Entertaining, I cannot decline to act on, the opinion, that Mr. Brame's assets, real and personal, are all liable under the disputed deed, exactly as if its provisions had been in favour wholly of specified individuals, without any attempt at perpetuity, and without any intention or object of a public or charitable kind.

THE LORD JUSTICE TURNER. — In this case the learned Judges who favoured us with their assistance have stated their opinion to be, that the deed in question is valid in law and not within the provisions of the Statute 9 Geo. 2, c. 36, and in stating this to be their opinion they have had regard, not merely to the express provisions of the statute, but to its general policy, and to the decisions which have been pronounced upon it. My learned * 538 brother agrees in the opinion which * the learned Judges have expressed, and I need hardly say, that in any event I should have felt great hesitation in differing from such high authority; but having entertained in the course of the argument some doubts upon the question, I have felt it to be my duty carefully to consider those doubts, and in the result I am satisfied with the conclusion at which my learned brother and the learned Judges have arrived. That this case does not fall within the words of the statute is, I think, clear. The words of the statute are [his Lordship read them]: and this deed neither conveys any real estate nor assigns any personal estate to be laid out in the purchase of real estate, nor charges or incumbers any real estate or any personal estate to be so laid out. It simply creates an obligation to be performed by the covenantor, or by his executors, within a limited time after his decease. It has left it to the covenantor in the mean time to dispose of his estate, both real and personal, as fully and effectually as he could have done if the deed had never been executed.

If, therefore, this deed be invalid in law, its invalidity must arise not from the express provisions, but from the policy of the statute, and it was upon this point, indeed, that the argument

against the deed mainly, if not wholly, proceeded, and that the doubts which I have felt upon the question entirely depended.

It was much pressed in argument, that to uphold this deed would be to enable any person, by means of such covenants as are contained in it, to dispose of all his real estate to charitable uses. Any person, it was said, might covenant to pay, for charitable purposes, a sum exceeding the value of his whole estate, both personal and real, and the covenant might be enforced against his heirs or devisees, as well as against his executor; and it must be * admitted, that this might be the case, but the * 539 statute has not in terms forbidden it, and the question still remains, Is such a disposition void, as being against the policy of the statute?

There is, perhaps, no question in the law more difficult to be determined than the question what particular acts, not expressly prohibited, shall be deemed to be void, as being against the policy of a statute. It is no doubt the duty of the Courts so to construe statutes, as to suppress the mischief against which they are directed, and to advance the remedy which they were intended to provide; but it is one thing to construe the words of a statute, and another to extend its operation beyond what the words of it express. In the latter case, one very material consideration, as I conceive, must be, whether the state of circumstances to which the operation of the statute is proposed to be extended existed, or might exist at the time when the statute was passed; for if we find this to be the case, and the statute is silent upon the subject, it may, I think, be reasonably concluded that it was not intended by the legislature that such a state of circumstances should fall within the provisions of the statute.

At the time when the statute was passed, on which the question before us depends, it must have been well known to the legislature that obligations of this description might be so entered into as to be capable of being enforced against the real estates of the persons bound by those obligations, but yet the statute is silent as to such obligations. This, as it seems to me, is of itself a circumstance of no mean importance, but it becomes of greater importance when we consider the provisions of the statute. This statute does not avoid all charitable dispositions. It leaves it open to a testator to convert * his property into pure personal estate; to * 540 dispose of it when so converted in charity to whatever

extent he may think fit, and however much his kindred may be prejudiced by the disposition. Its main object and purpose seems to be, to prevent the inalienability of land consequent upon the creation of charitable uses or trusts. The introductory recital is thus: [His Lordship read it.] And although the ulterior part of the same recital speaks of dispositions by languishing or dying persons, or by other persons to uses called charitable, to take place after their deaths, to the disherison of their heirs, it speaks of such dispositions not as being mischievous of themselves, and without reference to the inalienability of land, but as being the means by which that public mischief has been, of late years, greatly increased. The enactments of the statute strike at the very root of this evil, and no doubt are sufficiently stringent. In construction, perhaps, they have been carried, in early times, beyond what the Court has, of late years, been inclined to carry them; but looking at the statute in connection with the decisions upon, I think the fair result is, that it is to be construed as aimed at preventing not dispositions in favour of charity, but the inalienability of land consequent upon such dispositions.

The case of *Sorresby v. Hollins*, (a) referred to by the learned Judges on another point, and the case of *The Attorney-General v. Meyrick*, (b) support this view. When, therefore, we are called upon to pronounce a disposition not in terms prohibited by the statute to be void, as being contrary to its policy, it is material to consider what the terms of the disposition are, whether it tends to the mischief which the statute was intended to prevent,

* 541 and upon examining this deed, I cannot find that it * has any such purpose. On the contrary, the plain intent and purpose of this deed is the investment of 60,000*l.* in the 3*l.* per centum consolidated annuities, to be held upon charitable trusts.

So far, then, as this case depends upon the purpose of the deed, there is not, as it seems to me, any thing contained in it which is repugnant to the policy of the Act, and the cases which were referred to in the argument against the deed fall far short of satisfying me that it can be impeached upon this ground.

It was urged, however, against the validity of the deed, that at the time of its execution, the state of the covenantor's property

(a) 9 Mod. 221.

(b) 2 Ves. Sen. 44.

was such, that the covenant could not be satisfied without resort being had to his personal chattels savouring of realty, but the deed does not purport to assign these personal chattels, nor, as I have already observed, in any manner bind them. Had it done so, the case might have fallen within the very words of the statute. The state of the covenantor's property might be wholly changed before the covenant could be put in suit, and we cannot, I think, hold the deed to be void upon this ground, or upon any ground connected with the state of the covenantor's property, unless we are prepared to hold that every disposition of a debt to charitable uses is void, if, or so far as the debt may fall to be satisfied out of real estate or personalty savouring of realty, a point to which I shall presently advert.

Some argument against the deed was also attempted to be founded on the state of the property at the death of the covenantor, but the answer to this argument is, that the validity of the deed must be determined at the time of its execution. It cannot be valid or invalid from *time to time according to the state * 542 of the property which can be reached under it.

Another argument, and, as it has appeared to me, having regard to the earlier decisions upon the statute, the most difficult to be met was this, that, upon the covenant being put in suit, and judgment obtained upon it, chattels real, or even real estate, might be taken in execution and held for the purpose of satisfying what was due upon the judgment; but, although such property might, no doubt, be taken under an execution upon the judgment, I much doubt whether it could properly be held by the trustees. I am disposed to think that it would be the duty of the trustees to realize the judgment and invest the proceeds in bank annuities upon the trusts of the deed. But, at all events, this result of real estate or chattels real being held under a judgment, if it be the result of such a covenant as this, would be the consequence only of the remedies which the law gives for the recovery of debts or damages. And, extended as have been the decisions upon this statute, I am not aware that they have ever gone to the length of establishing that a disposition of property for charitable purposes would be void because real estate or chattels real might or would be affected by the remedies which the law gives for the recovery of such property.

The current of the modern decisions certainly would not justify

such a conclusion. In *The Attorney-General v. Giles* (a) it was held, that East India stock might be well given to charity, although the profits of the East India company, out of which the dividends are payable, are, as it would seem, in part derived from real estate in this country. In *March v. Attorney-General* (b) it was * 548 * held, that a policy of insurance might be so given, although the policy was payable out of the assets of the insurance company, which partly consisted of real estate.¹

And further (which seems to me to be a matter of much greater importance), it has not, so far as I am aware, ever been the practice of this Court, in cases where a residue has been given to charity, to direct any inquiry whether the residue has consisted of debts, or to what extent, if any, those debts would be payable out of the real estate of the debtors; an inquiry which, if the principle contended for by the parties opposed to this deed can be maintained, ought to be directed in every such case. For, so far as respects the source from which the debts are to be paid, there cannot, I think, be any sound distinction between a debt contracted by or due from the testator or settlor himself and debts due to him from third persons. In all such cases of gifts of residue, the general debts, so far as I am aware, have always been treated as part of the pure personal estate. The executors must receive them and hand them over to the charity in money, for the statute prevents the charity from electing to take them as charges upon the lands of the debtors. So, in the present case, the executors must pay the debt or the damages. To hand over to the charity trustees assets savouring of realty would not only be in contravention of the statute, but, as I apprehend, would, under the circumstances of this case, be a breach of trust on their part. The case of *Foone v. Blount* (c) appears to me in this respect to be parallel to the present case.

Upon the whole, therefore, my opinion is, that this deed is valid, and that the dispositions contained in it must be carried into effect.

* 544 * It was argued on behalf of the parties opposed to the deed, that, assuming the covenant to be alternative, and the remedy to be upon the second branch of it, the amount recov-

(a) 5 L. J. (N. S.) 44.

(c) Amb. 320, 767; Cowp. 464.

(b) 5 Beav. 433.

¹ See *Myers v. Perigal*, 2 De G., M. & G. 599, n. (2), and cases cited.

erable having been made subject to the payment of the funeral and testamentary expenses and other debts, and of legacies and annuities, ought to be treated as a gift of residue, and that an apportionment ought to be directed as in the ordinary case of a residuary gift to charity, but I see no foundation for this argument. In cases of residuary dispositions in favour of charity, the apportionment is directed in consequence of the partial failure of the disposition by reason of the provisions of the statute, but if this covenant is not affected by the statute, there is, in this case, no partial failure.

* The DOVER GAS-LIGHT COMPANY v. The MAYOR, * 545
ALDERMEN, and BURGESSES of the Borough of
DOVER.

1855. July 10, 14. Before the LORDS JUSTICES.

An Act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction. Therefore, in construing a gas company's Act, which, after requiring the consent of certain local commissioners to breaking up of the pavements, provided, that, where any consent was required and should be obtained by the company to break any pavement, to lay down pipes, or for any other purpose, which might be required under the Act, nothing in the Act contained should (after such consent obtained and after twenty-four hours' notice) prevent the company from breaking up the pavement for the purpose of laying down pipes, or for any other purpose which might be required under the Act. *Held*, that a construction "*reddendo singula singulis*" was not the correct one, and that the power to break the pavement was not to be confined to the particular purpose to which the consent had been expressly given.¹

THIS was originally an appeal from the decision of Vice-Chancellor WOOD on a motion for an injunction; but, by arrangement, instead of the appeal motion being heard, the cause came on before their Lordships to be disposed of on a motion for decree.

The plaintiffs were incorporated by an Act of Parliament passed in the year 1822, intituled "An Act for Lighting the Town and Port of Dover, and places adjacent, in the County of Kent, with

¹ See Kerr Inj. 846, 866, 898; Attorney-General v. Sheffield Gas Consumers' Co., 3 De G., M. & G. 304 and n. (2).

Gas," and were established as a company for lighting the town of Dover with gas, with power from time to time to enter into and make contracts with the commissioners appointed under certain local Acts of the 18th and 50th Geo. 3, or any other commissioners who for the time being should have the control, direction, or management of the lighting of the said town and port, and places adjacent, or with any other persons or corporations who might be willing to contract for the lighting of the town and port, and places adjacent, or any premises therein.

The sections in the Act of Parliament which were the
 * 546 * most material for the purposes of this suit were the 45th, 46th, and 47th, the two former of which were as follows :

" 45. That it shall be lawful for the said company, and they are hereby fully authorized and empowered (subject to the provisions and restrictions herein mentioned), by their servants, agents, workmen, and others, from time to time to make and erect such retorts, gasometers, receivers, and other buildings, cisterns, machines, engines and other apparatus, cuts, drains, sewers, water-courses, reservoirs, and other works, and to sink and lay pipes of such construction and in such manner as the said company shall think necessary or proper for carrying the purposes of this Act into execution, and also in a careful and workmanlike manner, doing thereby as little damage as may be, to break up the soil, pitching, and pavements of any streets, highways, roads, ways, footpaths, lanes, and passages within the said town and port of Dover, and the liberties and precincts thereof, or adjacent thereto, and to dig and sink trenches and drains, and lay mains or pipes, and put stop-cocks, syphons, plugs, or branches from such pipes, in, under, across, and along such streets, highways, roads, ways, footpaths, lanes, and passages, and in such manner as shall be necessary for the purpose of carrying this Act into execution, or supplying any such light as aforesaid ; and from time to time to alter the position of and to repair, relay, and maintain such pipes, stop-cocks, syphons, and plugs or branches, and also to carry, fit up, and furnish any pipe or pipes, cocks or branches, or other necessary apparatus, from any main or pipe laid in any street, highway, roadway, lane, footpath, or passage, by the said company by virtue of this Act into a dwelling-house or houses, manufactories, public or private buildings, for the purpose of light-

ing the same from any such mains or pipes, and to fix, place, and maintain any apparatus or *convenience necessary or requisite or deemed advisable for securing to any dwelling-house or houses, manufactories, public or private buildings, a proper and competent supply of gas, or for measuring and ascertaining the extent of such supply, and also to alter or amend any work which shall have been placed when the same shall be bad and imperfect, or which shall be injured or damaged in such dwelling-house or houses, manufactories, public or private buildings, and to do all such other acts, matters, and things of the same or the like nature as shall from time to time be necessary and convenient for the purposes of carrying this Act into execution: provided always, that a proper compensation be made by the said company of proprietors for any damage to be done by the said Acts respectively; and provided also, that nothing herein contained shall extend or be construed to extend to authorize or empower the said company or their successors to sink or make any such cuts, drains, sewers, watercourses, and reservoirs, in any situation or direction where the same can, shall, or may injure any present or future public or private drain, sewer, or well, nor to carry or lay any pipe or pipes, cocks or branches, from any main or pipe into or against any dwelling-house or dwelling-houses, manufactories, public or private buildings as aforesaid, or so to continue the same without the consent in writing of the owner or owners, or occupier or occupiers, for the time being, of every such dwelling-house or dwelling-houses, manufactories, public or private buildings as aforesaid: provided also, that the soil, pitchings, gutters, and pavements of any streets, highways, roads, ways, footpaths, lanes, and passages within the present or future jurisdiction of the said commissioners for executing the said recited Acts of the 18th and 50th years of the reign of his said late Majesty, shall only be broken up with the consent of such commissioners, and under the inspection of their *surveyor: provided also, * 548 that all works to be done or repaired within the jurisdiction of such last-mentioned commissioners be done under the inspection of such surveyor aforesaid (emergencies excepted): provided also, that all other public streets, roads, and highways shall only be broken up with the consent of the commissioners, trustees, or surveyors under whose care or superintendence the same roads or highways may be, and under the inspection of the surveyor or sur-

veyors of the commissioners or trustees respectively: provided also, that all private roads or ways shall only be broken up with the consent of the occupier or occupiers, and owner or owners of the soil thereof respectively.

"46. Provided always, and be it further enacted, that in all cases where any consent is required to be and shall be obtained by the said company, to break or take up or remove any pavement, soil, or ground in or of any streets, squares, market-places, bridges, highways, or other public places in the said town, township, or parish, in order to lay down any main or mains, pipe or pipes to convey gas, or for any other purpose which may be required under this Act, nothing in this Act contained shall, after such consent obtained as aforesaid, and after twenty-four hours' previous notice (or in case of emergency, after three hours' previous notice) in writing from the said company or their clerk, given to or left at the place of abode of such surveyor or surveyors, or of the clerk to such trustees or commissioners, or the person having the property of such soil or pavement, be deemed or construed to extend to prevent the said company from repairing such main or mains, pipe or pipes, or from breaking or taking up, or removing any pavement, soil, or ground in or of any streets, squares, market-places, bridges, highways or other public place whatsoever, for the purpose of laying down or repairing any

* 549 *such main or mains, or any pipe or pipes whatsoever, or for any other purpose which may be required under this Act."

The 47th section provided, that if the owners of private houses required pipes which had been laid down to their houses to be removed, the company should remove them within a limited time.

The plaintiffs, immediately after the passing of the Act, commenced supplying gas to the inhabitants of the town of Dover, and laid down their mains and pipes through the streets and thoroughfares of the town, and the commissioners for executing the Acts of the 18th and 50th Geo. 3 had consented to the pavement, soil, and ground of the streets and thoroughfares being taken up and removed for that purpose.

A new contract for lighting the town of Dover was entered into by the plaintiffs upon the 30th December, 1843. By this contract, which was made between the above-mentioned commissioners of

the one part, and the plaintiffs of the other part, the commissioners did, for themselves and their successors, and so far as they lawfully might, give and grant unto the gas company and their successors for the term of twenty-one years, from the 6th day of January then next ensuing (determinable nevertheless by the said commissioners as is hereinafter mentioned) the liberty, leave, license, and consent of the commissioners to continue the gas mains and pipes already placed and laid, and to place and lay new mains and pipes when and where the same should be required and directed, and from time to time to replace, renew, and repair the same or either of them for the conveyance and conduct of gas to be used in lighting lamps or other * lights * 550 in and along the streets, lanes, roads, passages, and other public places in and near the town of Dover, and places adjacent, under the inspection and subject to the approbation of the commissioners or their surveyor for the time being, and to take up so much of the pavements, soils, and pitchings under the direction of the said commissioners, or their surveyor, in the said streets, lanes, roads, passages, and other public places as might be necessary to lay and place such new mains and pipes as aforesaid, or for replacing, renewing, and repairing the same, or the mains and pipes already placed and laid from time to time when the same, or either of them, should require, so that, in so doing, as little harm and damage as possible should be done, and the several terms and conditions thereafter specified should be duly observed by and on the part of the gas company and their successors: provided always, that no main or branch pipe should be laid under any footway without the special consent, in writing, of the commissioners for that purpose being first had and obtained. The deed contained covenants, on the part of the gas company with the commissioners, to provide and keep cleaned and repaired all proper and necessary mains, branch and service pipes, and all the necessary apparatus for making, preparing, and purifying gas upon the most improved principles of extraction and refinement, together with all necessary furniture for lighting the aforesaid streets, lanes, roads, passages, and other public places with gas.

By the Public Health Act, 1848, and an order of the general board of health, dated the 23d May, 1850, the powers which had been vested in the above-mentioned commissioners were transferred to the defendants (the mayor, aldermen, and burgesses

of the borough of Dover) as constituting the local board of health.

* 551 * The consumption of gas within the borough had greatly increased, and in order to supply the demand for gas made upon them, it had lately become necessary for the plaintiffs to purchase, and they had purchased a piece of ground within the borough of Dover, upon which they proposed and intended to erect a gasometer. They further proposed and intended to convey to, and keep in such gasometer a store of gas, but they did not propose or intend to manufacture any gas on the said piece of ground. They further proposed and intended to connect such gasometer with proper mains and pipes, and to carry such mains and pipes under and through the streets, roads, and lanes of the borough, for the purpose of meeting and supplying the increased demand for gas.

According to the statements of the bill, the defendants alleged that the intended erection by the plaintiffs of a gasometer on the ground purchased by the plaintiffs within the borough was the establishment of a noxious or offensive business, trade, or manufacture within the limits of the jurisdiction of the defendants as the local board of health, and they refused to consent thereto, and threatened and intended to prevent the same by all means in their power, and they declined to allow the plaintiffs to open the streets, or to lay down pipes for the purpose of conveying gas from the said gasometer, and they refused to exercise, either by themselves or their surveyor, any judgment as to, or to give any approbation of, the manner in which the said streets should be opened, for the purpose of laying down the said pipes, but they insisted and contended that the said streets should not be opened in any manner whatever.

On the 15th May, 1855, the plaintiffs commenced digging a trench in Fector's Place, being one of the * streets within the borough, in order to lay down a main pipe, and they brought to the spot six lengths of pipe and a bend to be laid down. The surveyor of the defendants then put on a gang of men and filled in the trench, and took down the names of the five men who had been working for the plaintiffs, and stated that they would be summoned for penalties under the 68th section of the Public Health Act, 1848.

The bill alleged that the plaintiffs were unable to proceed in

opening the streets without the danger of occasioning a breach of the peace between their servants and those of the defendants, and that the plaintiffs were unable to procure the interference of any magistrate or constable by reason of the claim of right set up by the defendants under the said Acts of Parliament.

The bill further alleged, that there was now, and for many years past had been, a gas pipe of the plaintiffs laid and maintained through the whole length of Fector's Place, and that the trench made by the plaintiffs was close and parallel to that pipe. It further alleged, that there had for many years past been mains and pipes of the plaintiffs laid and maintained from Fector's Place to the gas works of the plaintiffs, and passing the site of the intended gas-holder, and that the mains and pipes to be connected with the intended gas-holder would be alongside and close to such existing mains and pipes.

The prayer of the bill was, that it might be declared that the plaintiffs, under and by virtue of their Act of incorporation, were entitled to sink and lay down pipes, and in a careful and workmanlike manner, doing as little damage as might be, to break up the soil, pitchings, and pavements of the streets, roads, lanes, and passages within the borough of Dover, and to lay mains or pipes * along such streets, roads, and passages in such * 553 manner as should be necessary for the purpose of the said Act; the plaintiffs being ready and willing (if the Court should be of opinion that the defendants, under the circumstances therein stated, were entitled to require the same) that the said pipes should be laid down, and the said soil, pitchings, and pavements broken up, under the inspection and subject to the approbation of the defendants or their surveyor, as to the manner of laying down and breaking up the same respectively; that the defendants, their workmen, servants, officers, and agents, might be restrained by the order and injunction of the Court from preventing or interfering with the plaintiffs in laying down pipes and breaking up the soil, pitchings, and pavements of the streets, lanes, and passages within the borough of Dover, and performing the other works authorized by the Act incorporating the plaintiffs.

Mr. Rolt and Mr. Cairns, for the plaintiffs.

Mr. W. M. James and *Mr. H. Clarke*, for the defendants.

The nature of the arguments appears sufficiently from the judgments.

Judgment reserved.

July 14.

THE LORD JUSTICE KNIGHT BRUCE. — The main, if not the only, question in this cause is whether, without the consent of the defendants, but under the conditions, in all other respects, prescribed by the Act of 1822, mentioned in the pleadings, the plaintiffs lawfully can, in those streets of the town of Dover in which gas-pipes have already been lawfully laid down by them under the provisions of the Act, and now are in use accordingly, lay down additional gas-pipes parallel * and to be used with the others for the same purpose of supplying gas-light in the town, and I am of opinion that, according to the true construction of the Act, particularly those sections of it which have been called the 45th, 46th, and 47th, the question must be answered in the affirmative. It is one as to which I do not upon reflection entertain any doubt; the language of the 46th section, according to its ordinary and proper meaning, being large enough to admit, and there being, I think, nothing in the context to prevent or to render unreasonable or inconvenient this interpretation.

We were asked by the counsel on each side to decide, so far as we could, a point, upon which, though merely legal, we have certainly, on the pleadings and according to the course of the Court, jurisdiction to make a declaration and enforce that declaration by an injunction, and I have no objection to do so.

Something was said in argument of the plaintiffs' gasometer, with which the new pipes are to be connected. The gasometer ought not, I conceive, to stand in their way. Built on land, the private property of the plaintiffs, it has not hitherto become a nuisance or caused a nuisance, nor does the evidence persuade me that it will, certainly or even probably, hereafter become a nuisance or cause a nuisance.

THE LORD JUSTICE TURNER. — The case stands now before us in a different position from that in which it stood before the Vice-

Chancellor, for the question before his Honor was as to the propriety of granting an interim injunction, a question depending mainly on the comparative inconvenience arising from granting or withholding the injunction.

* The question now before us, at the hearing of the cause, * 555 is one of right, depending mainly, if not wholly, on the construction of the Act by which the company is incorporated.

By that Act the company was established for lighting the town ; but that was not the only purpose of its incorporation, as it was incorporated also for the purpose of contracting with the commissioners for lighting the town and port and places adjacent, and power is given to contract accordingly. The Act has therefore two purposes, the public advantage and the convenience of the inhabitants, and an Act of Parliament passed for these purposes ought not to receive narrow construction.

We must consequently look at the particular provisions of the Act on which the question before us immediately depends, with a view, not indeed to strain the construction of the language of the Act, but, where the words are open to doubt, to give them a construction which may advance the objects of the Act.

The question immediately depends on the 45th and 46th sections. The 45th is thus : [His Lordship read it.]

No doubt if the case had rested there the company could not have laid down pipes without the consent of the commissioners, but then comes the 46th section, which runs thus : [His Lordship read it.]

There is as it seems to me only one question upon this section, and that is, as to the meaning of the words "for any other purpose which may be required under this Act." It is contended on the part of the defendants that the clause is to be construed "*reddendo singula * singulis*," and that the consent given * 556 for any purpose must be used for the same purpose.

But if this had been the intention of the legislature, surely the rights to flow from the consent would not have been expressed in terms more extensive than the consent from which they were to flow, as is plainly the case in this Act, for, according to the language of it, if the required consent has been given to lay down any main or mains, pipe or pipes, the Act is not to prevent the pavement from being broken up, for the purpose, not merely of laying

down or repairing such main or mains, pipe or pipes, but any pipe or pipes whatsoever.

It cannot, I think, be denied that, under these words, if consent was given to lay down a main and a pipe, or, as I should think, a main only, in a street, it would be competent to the company to lay down any number of pipes in the same street. If, then, the right, flowing from the consent, goes beyond the consent in the one case, how is it to be limited in another ?

The very next section in the Act, the 47th, tries this point. 'If owners of private houses require pipes which have been laid into their houses to be removed, the company are to remove them in a limited time, but this cannot be done without breaking up the pavement; and where is the right to break up the pavement for any such purpose, unless the words "for any other purpose which may be required under this Act," contained in the preceding section, be construed generally, and not in the limited sense for which the defendants have contended ?

This 47th section has suggested to my mind a possible doubt whether the words "required under this Act" might not * 557 mean "rendered obligatory upon the company * by the Act," but this point was not suggested in argument, and I do not think it can be maintained. The language of the 46th section is, "may be required," not "is required." The word "required" must, I think, have the same construction in the latter part of the section as in the early part of it; and in the early part it has reference to a consent obtained. If the word "required" in this part of the section be construed "rendered obligatory," we must impute to the legislature that it meant here to speak of a consent obtained to an act rendered obligatory. If such had been the intention I think more appropriate language would have been used. I think, too, that this construction would be against the spirit of the Act. There are, as I have observed, public and private convenience, and why are we to suppose that the legislature, encouraging the company to incur expense for the public convenience, did not intend to give them the largest range of profit to which private convenience might lead ?

My opinion, therefore, is, that neither the limited construction contended for by the defendants, nor that which I have suggested, can be supported; and the case then comes to this, that a general power is given by the legislature, and there is no sufficient context

to control it. Under these circumstances the general power must, I think, prevail.

A further point was raised on the part of the defendants, that the local Acts (so far as they affect the question before us) have been repealed under the provisions of the Public Health Act, and that the case is governed by the 68th section of that Act; but upon examining the provisional order of the board of health, which I understand to have been sanctioned by Parliament, I am satisfied that there is no foundation for this argument.

* WHEATLEY v. BASTOW.

* 558

In the Matter of COLLINS, one, &c.

1855. August 2. Before the LORDS JUSTICES.

A solicitor, who, without authority, instructed counsel to appear for parties interested in money in Court, and to consent to its payment out of Court, was ordered to be struck off the rolls.

THE facts of this case are stated *ante*, page 261, in the report of the hearing.

In pursuance of the direction given by their Lordships on the hearing, notice was given, by the solicitor to the suitor's fund, to Mr. Collins, to show cause why he should not be struck off the rolls of the solicitors of the Court.

Mr. Taylor appeared for the solicitor for the suitors' fund.

Mr. Cairns, for Mr. Collins.

THE LORD JUSTICE KNIGHT BRUCE. — The confidence placed by this Court in solicitors invests them, practically, with a power over the property intrusted to the Court, which is of a very important and extensive description. No doubt it is a confidence liable to abuse, but I am happy to believe that very few instances of its abuse occur.

When it is recollected through what forms, and in what manner,

transfers of the various funds, to a great amount standing in the name of the accountant-general of the Court, are obtained, it is obvious, that if the execution of the duties of solicitors, so far, especially, as property of this kind is concerned, is not
 * 559 carefully * watched, ruin of the most painful description may ensue, and families be deprived of their whole means of subsistence. Persons interested in these funds in Court, are, to a very great extent, considered as represented by their solicitors. If a solicitor instruct counsel to consent, by that consent, the client, generally, is bound, the Court acting upon it, and the funds being disposed of accordingly. It is evident, that if the Court were to visit cases of the present description with too great indulgence or lenity, it would fail in the performance of a public duty of a most important kind.

In the present case, Mr. Collins was the solicitor of a gentleman named Bastow, and also of his own niece, Mrs. Wheatley, and of her brother, and perhaps may be taken to have been the solicitor of her husband also. All these persons were materially interested in a fund in the Court of Chancery. Mr. Collins, without warrant, without authority, without any permission which could by any reasonable being have been possibly thought to justify, or even to render excusable such a proceeding, instructed counsel, on behalf of Mr. Bastow and Mr. and Mrs. Wheatley, to consent to the abstraction of the fund for purposes alien and opposed to their interests. Mr. Bastow was at that time absent from England, and it is said, that when informed of what had been done, he disapproved of it, but he seems to have been in a sense satisfied by Mr. Collins's acknowledgment that he had done wrong, and to have received some compensation or security at his hands. It must be remembered, however, that Mr. Bastow had ceased to be an absolute owner at that time, and that his rights had vested in the trustees of his marriage settlement, whose interests were not communicated to the Court, and were not affected to be represented.

* 560 * For this the excuse offered by Mr. Collins is, that, though the marriage settlement was prepared in his own office, and he was the solicitor intrusted, instructed, and employed for the purpose of preparing it, he was not aware of the nature of the settlement, or especially that this property was included in it. For a civil purpose, Mr. Collins would, of course, make such an

assertion ineffectually. Perhaps for a purpose merely criminal, in the ordinary sense of the term, he might be allowed to make that assertion, if true, effectually. Whether for the purpose of the present application, which is to remove Mr. Collins from the confidential position of a solicitor of the Court, he can make it effectually, I have some doubt, but having that doubt, I am willing that he should have the benefit of it. I am sorry to say, however, that this does not, in my opinion, substantially improve the case. Mrs. Wheatley was his niece, he was on terms of intimacy with her. He had, probably, been very kind to her. It may have been his duty to be so, but it was a duty of imperfect obligation, and he should have every credit for it. She was frequently at his house. Mr. Collins states, that the arrangement for the disposition of the property, in the singular and most improper manner resorted to, was a frequent subject of conversation between him and the ladies of the family, and he says he is confident, from the terms on which Mrs. Wheatley and her husband were, that Mrs. Wheatley would have informed her husband of all that took place. Mr. Collins (and it is creditable to him) does not suggest that he ever communicated with Mr. Wheatley himself on the subject. I find it impossible to believe, that if Mr. Collins had supposed that Mr. Wheatley would have consented, or had thought the transaction a reasonable or proper one, he would not have communicated it to Mr. Wheatley. It is quite plain that he did not communicate it. Mr. Wheatley is still living, and there is no *rea- * 561 son for supposing him to be unfavourably disposed towards Mr. Collins, his wife's uncle. He has not come forward as a witness on the present occasion, nor has Mr. Collins asked him to be a witness. In these circumstances the conclusion is irresistible. Both consents were most improperly given, — given without authority, — given, I am sorry to say, without any ground on which Mr. Collins could, as a reasonable man, believe that he was authorized to give them.

Whatever condonation there has been on Mr. Bastow's part, it is no condonation, so far as this Court and the interests of society are concerned, nor on the part of Mr. Wheatley has there been condonation, although there has been an absence of pressure and harshness, which, when the loss that he has sustained is considered, seems creditable to his kind feeling in a high degree.

I have said nothing of the untrue assertion in the petition with

respect to the payment of the 500*l*. It is, in my opinion, immaterial, when what else there is in the case is recollected, — I will assume that Mr. Collins's representations are correct upon that point.

I deeply regret the duty which is imposed upon me, but I should be wholly departing from what is due to this position, and to society, if with the knowledge of the facts which we have, and after the opportunity of explanation which has been afforded, I were not to declare that Mr. Collins ought not to continue in the trusted position of a solicitor of the Court. His name must be removed from its rolls, and the proper communication of this fact be made to every other Court in Westminster Hall.

* 562 The Lord Justice TURNER, after observing upon the *extreme importance of the due observance by solicitors of their duty to the Court with respect to the funds in its custody, and the public mischief which would arise from the mere possibility of their being dealt with by the officers of the Court to the prejudice of those who were interested in them, proceeded to review the facts of the case, and said, that if any circumstances could have justified a solicitor in instructing counsel to consent in such a case without the express authority of the client, those circumstances were wholly wanting, but that, in his opinion, no circumstances could, in such a case, have justified a solicitor in giving instructions to consent without the client's express sanction and authority. That solicitors could not, in such cases, be permitted to rely on the possibility of a subsequent ratification of the consent. That he felt it his duty, therefore, to concur in the order proposed to be made.

THE LORD JUSTICE KNIGHT BRUCE. — It should be known that, however personally painful it may have been to us to perform this duty, it has not been prompted or moved by any one but ourselves. We ordered the proceedings from a sense of public duty, and they are directly and solely attributable to us.

* PADDON v. RICHARDSON.

• 563

1855. July 9, 11, 12. August 3. Before the LORDS JUSTICES.

Under a trust to lend trust money to one of the trustees on his personal security until the trustees should deem it advantageous to invest the money in the funds: *Held*, that the omission to call in the money, which had been accordingly lent to the trustee, and its consequent loss, did not, in the absence of any proof of misconduct on the part of his co-trustee, create any liability on the part of such co-trustee.¹

Held, also, that as payment of the debt was only enforceable in equity, and the *cestui que trust* might have enforced it himself, this circumstance was an answer to a suit by him seeking to render the co-trustee personally liable.²

THIS was an appeal from a decision of Vice-Chancellor STUART, holding that the estate of the appellants' testator was liable to make good the consequence of an alleged breach of trust committed by that testator in not getting in a part of the trust property.

The trust in question was created by a deed executed by persons beneficially interested under the will of Mr. Christopher Magnay, who, down to the time of his death, carried on business in partnership with his sons Christopher James Magnay and Sir William Magnay, under articles dated the 1st October, 1820, the term limited by which was nineteen years, determinable by any one of the partners at the end of the first five or twelve years.

By his will, dated the 7th January, 1824, Christopher Magnay directed that his executors should carry on the business with his said sons, or the survivor of them; and he directed that his capital and other interest in the copartnership and the profits therefrom should be considered as part of his residuary trust estate; and all the residue of his moneys, securities for money, money in the funds, goods, chattels, and personal estate and effects, of what nature soever, he bequeathed unto his wife Harriett Magnay the elder, Christopher James Magnay, Sir William Magnay, and the appellants' testator Thomas Richardson, their executors, adminis-

¹ See *Lewin Trusts* (5th Eng. ed.), 237, 258; *Styles v. Guy*, 1 Mac. & G. 422, and cases in notes (2) and (3), 428 notes, 429 notes (1) and (2), and cases cited; *Davis v. Spurling*, 1 R. & M. 64; *Birls v. Betty*, 6 Mad. 90.

² See *Lewin Trusts* (5th Eng. ed.), 237, n. (c); *Horton v. Brocklehurst*, 29 Beav. 511.

trators, and assigns, upon various trusts, which it is not
 * 564 necessary to state, as * they were modified by the provisions
 of the deed on which the decision turned.

The will was proved by the executrix and executors, Harriett Magnay the elder, Sir William Magnay, Thomas Richardson (the appellants' testator) and Christopher James Magnay, deceased.

By the deed of arrangement in question, which bore date the 22d October, 1832, and was expressed to be made between Harriett Magnay the elder of the first part, Thomas Richardson of the second part, Caroline Magnay, the widow and personal representative of Christopher James Magnay, of the third part, Harriett Magnay the younger, Anne Magnay, Ellen Magnay, Mary James, then Mary Magnay, of the fourth part, William Boyd and Jane his wife, and James Magnay, George Magnay, Charles Magnay, Edward Magnay, Frederick Arthur Magnay, Alexander Magnay, Alfred John Magnay, and Claudius Magnay, of the fifth part, and Sir William Magnay of the sixth part, after reciting, amongst other things, the partnership articles, and the will of Christopher Magnay and the probate thereof, and the death of Christopher James Magnay, and that doubts having been entertained whether the partnership had thereby been dissolved, Sir William Magnay had given such notice of dissolution as aforesaid; and reciting that, in conformity with the said notice, Sir William Magnay had, on and from the 1st October then instant, discontinued the use of the business firm or name of Christopher Magnay & Sons; and that he on the said 1st October began, and from that time had continued to carry on the business in his own name and on his own account solely; and reciting that all such parts of the separate estate and effects of the said testator Christopher

* 565 Magnay as were not specifically bequeathed * by his will in the manner thereinbefore mentioned (except his English stock in the Stationers' Company) had been collected, sold, and converted into money by his executors, and that out of the moneys thence arising his separate debts and funeral and testamentary expenses, and the legacy duties payable on four legacies of 5000*l.* each to his four unmarried daughters, and on his residuary personal estate, had been paid; and that the residue of such moneys had, in pursuance of the directions of his will, been paid into the copartnership business and added to his capital therein, and interest had been allowed thereon, and that the same remained in the

said business on the 1st of the then instant month of October; and reciting, that it had been considered by all parties thereto that the general advantage of the family of Christopher Magnay, and also the advantage of Caroline Magnay, as the administratrix of Christopher James Magnay, would be greatly promoted by such alterations in the dispositions of the will of Christopher Magnay, and by such arrangements, regarding the respective capitals and shares of Christopher Magnay and the administratrix of Christopher James Magnay in the property, debts, and effects which, on the said 1st October then instant, were in or belonged to the business, and by such arrangements respecting the other matters and things thereafter mentioned, as were thereafter expressed, it was witnessed, that Harriett Magnay the elder, Thomas Richardson, Caroline Magnay, Sir William Magnay, and each severally of the several persons parties thereto of the fourth and fifth parts, thereby for herself and himself, and her and his heirs, executors, and administrators, covenanted with the others, and separately with and to each and every of the others of the several persons parties thereto, and their, her, and his respective executors, administrators, and assigns (among other things), as follows:—

* 1st. That the partnership and business and term of nine- * 566
teen years, by the agreement of the 1st October, 1820, established or created and agreed to be carried on, should be considered as having subsisted and been carried on by and between Sir William Magnay and the executors of the testator Christopher Magnay and the administratrix of Christopher James Magnay, from the death of Christopher James Magnay up to the 1st day of the then instant month of October, and that the parties to the partnership, from the death of Christopher James Magnay to the 1st day of the then instant month of October, should be and be considered as having been entitled to the gains and profits of the said partnership business in the shares and proportions therein mentioned, and that the partnership should be considered as having been absolutely determined and dissolved on and from the 30th September then last, and Sir William Magnay should be and be considered as having been solely entitled, as on and from the 1st day of the then instant month of October, to the business theretofore carried on under the firm of Christopher Magnay & Sons.

3d. That, with all convenient speed, the accounts in respect of the business which had been so carried on under the firm of Chris-

topher Magnay & Sons should be stated, adjusted, and settled, and that the debts owing to Sir William Magnay or the partnership in respect of the same business should be collected by Sir William Magnay, his executors or administrators, with all convenient speed; and the other property belonging to the same partnership (except such as were to be purchased by Sir William Magnay as aforesaid) should be sold and disposed of or converted into money by Sir William Magnay, his executors or administrators, at such times

and in such manner as he or they should, in his or their dis-

* 567 cretion, think proper and advantageous; and that all * the debts owing from or by Sir William Magnay or the partnership in respect of the business should be paid, or provision should be made for the payment thereof, when and as the same should become due and payable, out of the cash then belonging to the partnership business of Christopher Magnay & Sons, and the moneys to be so collected and to arise from the sale and disposition or conversion into money; and that Sir William Magnay should pay interest, at the like rate of 5*l.* per cent per annum, half-yearly, on the 1st April and the 1st October, as from the respective times at which the same should be actually received, upon the shares of the executors of the testator Christopher Magnay and the shares of the administratrix of Christopher James Magnay respectively of and in the remainder of the said cash and moneys.

7th. That the share of the executors of the testator Christopher Magnay of and in the capital, profits, debts, property, and effects, which on the 30th September then last were employed in or belonged, or were owing to the partnership business carried on under the firm of Christopher Magnay & Sons, or Sir William Magnay, or the partners in respect thereof, should with all convenient speed be ascertained, and that out of the first moneys which should be realized on account of such share (considering the executors' share of the leasehold tenements, and the fixtures, utensils, and stock in trade, as already realized by Sir William Magnay's purchasing the same as thereinbefore mentioned), there should be appropriated the sum of 20,000*l.* sterling, as the fund for answering and paying, by the interest, dividends, and annual produce thereof, and the stocks, funds, and securities in or upon which the same should be invested, the annual sum of 800*l.* for Harriett Magnay the elder, and for answering and paying the legacy or portion of 5000*l.* by the will bequeathed to or pro-

vided for each of his daughters * Harriett Magnay the * 568 younger, Anne Magnay, Ellen Magnay, and Mary Magnay.

9th. That the one-fourth share of each of them the said Harriett Magnay the younger, Anne Magnay, Ellen Magnay, and Mary Magnay of a sum of 20,000*l.*, which was to be appropriated for answering and paying their respective legacies or portions of 5000*l.* each, and of the stocks, funds, and securities in or upon which the same should be invested, or of the produce of such stocks, funds, or securities, should be and they did thereby respectively accept the same in full satisfaction and discharge of their respective legacies or portions of 5000*l.* each, whether such one-fourth share should amount to more or less than 5000*l.* sterling, and that the one-fourth share of each of them of the appropriated sum of 20,000*l.*, and the stocks, funds, and securities in or upon which the same should be invested, or of the produce of such stocks, funds, or securities, should be subject to a power by the will given to the trustees or trustee for the time being of advancing 1000*l.* to or for each daughter upon her marriage, with such consent as therein mentioned.

12th. That inasmuch as any other eligible security on which to invest the 20,000*l.* had not then been found, and Harriett Magnay the elder, and her said daughters, parties thereto of the fourth part, had, in consequence, required Sir William Magnay to retain the same in his hands by way of loan, until such a security did offer, the said sum of 20,000*l.*, to be so appropriated out of the first moneys which should be realized on account of the share of the executors of the testator, Christopher Magnay, of and in the capital, profits, debts, property, and effects which on the 30th September then last were employed in or belonged or were owing to the partnership business, or Sir William Magnay, or the * said partners in respect thereof, pursuant to the seventh * 569 article of the now stating deed of arrangement as aforesaid, should be lent to Sir William Magnay, and he should retain the same in his hands by way of loan from the said trustees and executors, at the interest of 5*l.* per cent per annum, payable half-yearly, on the 1st April and the 1st October in every year, until the said trustees should deem it advantageous to invest the same 20,000*l.* in the parliamentary stocks, or public funds of Great Britain, or upon real or other security, and should require Sir William Magnay to pay the same, and then the same should be paid

by Sir William Magnay by three equal instalments at the expiration of six, nine, and twelve calendar months next after he should be so required to pay the same, and the same sum should be so invested, and that the said sum of 20,000*l.* should accordingly be carried from the credit of the executors' general account with the partnership to a separate account between Sir William Magnay and the trustees of the testator Christopher Magnay's will, to be entitled "The account of the trustees under Mr. Christopher Magnay's will for Mrs. Magnay, and her daughters, with William Magnay," and after the same should be paid by Sir William Magnay the said sum of 20,000*l.* should be invested in the names of the said trustees, and that out of the interest and dividends and annual produce of the said sum of 20,000*l.*, and the stocks, funds, and securities in or upon which the same should be invested, there should be paid to Harriett Magnay the elder, during her life, if she should so long continue the widow of the testator Christopher Magnay, the sum of 800*l.* per annum, by even half-yearly payments, on the 1st April and the 1st October in every year, and the residue of the interest, dividends, and annual produce from time to time

should be retained by Sir William Magnay, at the like interest of 5*l.* per cent per annum, by way of loan * to him from the said trustees, or should be invested in or upon such stocks, funds, or real or other securities as aforesaid, so that the same might accumulate and form a fund, to be applied by the trustees or trustee for the time being in such shares or amounts, at such times and in such manner, as they, she, or he might, in their, her, or his discretion, think expedient for the use or benefit either of Harriett Magnay the elder or Harriett Magnay the younger, Anne Magnay, Ellen Magnay, and Mary Magnay, or the residuary legatees of the testator Christopher Magnay (except Sir William Magnay), or for all or any of them the said several persons.

At or shortly after the date of this deed it was executed by all the parties thereto, who were then of age, except Thomas Richardson, and it had been since executed by such of the parties as at the date thereof were infants, when and as they attained the age of twenty-one years.

The case made by the bill was, that Mr. Richardson had accepted the trusts of the deed of arrangement.

On the 1st July, 1837, the plaintiff, John Edward Paddon,

intermarried with Ellen Magnay, and upon such marriage 1000*l.*, part of the portion or fortune of Ellen Magnay, was in pursuance of the provisions in that behalf contained in the testator's will, as modified by the deed of arrangement, and with the consent of Ellen Magnay, raised and paid to John Edward Paddon by Thomas Richardson, Sir William Magnay, and Harriett Magnay the elder.

By an indenture of settlement, dated the 1st July, 1837, made on this marriage, trusts were declared of the residue of the portion of Mrs. Paddon for the benefit of Mr. and Mrs. Paddon, and their children, but it * did not appear that Mr. * 571 Richardson had notice of this settlement.

The bill alleged, that the plaintiff John Edward Paddon, and Ellen his late wife, had often applied to Mr. Richardson and Sir William Magnay, as well by letter as otherwise, and requested them to call in and invest the 4000*l.*, being the residue of the sum payable to Mr. Paddon under the deed of arrangement, and the bill set forth several of such applications, and the answers to them, among which were the following:—

“Fareham, 23d July, 1846.

“Sir,—I hope to be excused for recalling your attention to a subject which you have, doubtless, almost forgotten. I allude to your position as executor and trustee under the will of the late Alderman Magnay; the character in which I address you is as the husband of Ellen, one of his daughters, and the purpose is to bring about a settlement of the affairs, which, in my judgment, has been much too long delayed. Connected as I am with the family, and standing on the terms of kindness and good fellowship with all its several members, I desire to avoid saying any thing beyond this, that the position of the trust fund is highly unsatisfactory to my wife and myself, and that it is our decided wish that the whole, if necessary, but, at all events, so much as we are interested in, should at once be properly secured, which at present is not the case. In calling for this arrangement, I am only seeking the fulfilment of promises made previous to my marriage, and since repeated, and I venture to request that, in your capacity of trustee, you will aid in the accomplishment of my wishes.

“I am yours, &c.,

“J. E. PADDON.”

* 572

* Stanford Hill, 31, 7 mo. 1846.

"Respected Friend, J. E. Paddon,— I was favoured with thy letter of the 23d on my return from Yorkshire, in reply to which, thou art quite correct in supposing I had almost forgotten the subject on which thou writes, having ceased for so long to take any interest in the affairs of my late friend Christopher Magnay, considering that my duties, as trustee and executor under his will, had terminated long ago. I should be sorry to see any thing but harmony in the family; but, under the circumstances, I cannot interfere. My best respects to thy wife.

"I am, &c.,

"THOMAS RICHARDSON."

Mrs. Paddon having died, the original bill was filed by Mr. Paddon and the children of the marriage against Thomas Richardson and his co-trustees. It alleged that no part of the 20,000*l.* had been paid, other than the 1000*l.* paid to the plaintiff Mr. Paddon, and another sum of 1000*l.* paid to another *cestui que trust*, and it charged that the defendant Sir William Magnay was in insolvent or embarrassed circumstances, and that the trust fund remaining in his hands was in danger of being lost if the same was allowed to remain uninvested. It further charged that any loss which might be sustained by the trust estate in consequence of the defendant Sir William Magnay's inability to pay the same, or otherwise in respect of the non-payment thereof by Sir William Magnay, had been occasioned by the refusal or neglect of Thomas Richardson to call in and secure the sum of 20,000*l.*, or to allow the same to be paid off and invested by the defendant Sir William Magnay, and ought to be made good by Thomas Richardson. The

bill also charged that, in the year 1837, and thenceforward * 573 until and in the year 1846, the defendant Sir * William

Magnay was in good credit and circumstances, and was perfectly able to pay the sum of 20,000*l.*, or to give good and adequate security for the same; and that the defendant Thomas Richardson was fully aware thereof and of the desire of the parties beneficially interested in the sum of 20,000*l.*, that the same sum should be at once invested or properly secured, but nevertheless he, the said last-named defendant, neglected or refused to call in the same sum or to allow the same to be paid by the defendant Sir William

Magnay, although he was well aware, as the fact was, that for several years past the defendant Sir William Magnay had been declining in credit, and in his circumstances.

The bill prayed, among other things, that if and so far as might be necessary, and so far as the trusts of the testator's will, as modified by the deed of arrangement, remain unperformed, such trusts might be performed and carried into execution under the decree and direction of the Court; and it sought a declaration that the defendant Thomas Richardson was liable, and ought to make good to the trust estate so much of the sum of 18,000*l.*, and of the interest, dividends, or annual produce thereof, as should not be paid or satisfied by the defendant Sir William Magnay, and all such loss as should be occasioned to the said trust estate by reason of his, the defendant Thomas Richardson's, refusal or neglect to call in and invest or obtain security for the trust fund, and that the defendant Thomas Richardson might be decreed to pay the same accordingly.

Mr. Richardson died pending the suit, and after his death similar relief was sought against his estate. The Vice-Chancellor decreed accordingly, whereupon Mr. Richardson's executors appealed from the whole decree.

* *Mr. Bacon and Mr. Freeling*, for the plaintiff, in support * 574 of the decree. — The evidence shows clearly that Mr. Richardson, although he did not execute the deed, took an active part in the negotiations which led to its execution, and advised the parties beneficially interested to execute it. He has also acted under it, and cannot be heard to repudiate the trusts which it created. He was bound, therefore, to exercise the discretion reposed in him by the terms of the deed, and was not justified in leaving his co-trustee Sir William Magnay to deal with the trust fund as he pleased. *Styles v. Guy.* (a) It appears clear that Mr. Richardson must have known in 1846 of Sir William Magnay's failing circumstances, and it was his duty forthwith to insist on the fund being called in, and to file a bill, if necessary, to enforce his demand.

They also referred to *Mucklow v. Fuller*, (b) *Buxton v. Buxton*, (c) *Ward v. Ward*, (d) *Rowley v. Adams*. (e)

(a) 1 Mac. & G. 422.

(c) 1 Myl. & Cr. 80.

(e) 2 H. L. Cas. 725.

(b) Jac. 198.

(d) 2 H. L. Cas. 777, n.

The Solicitor-General (Sir R. BETHELL), *Mr. Malins*, and *Mr. Greene*, for the appellants. — In the first place, Mr. Richardson never accepted the trusts of the deed. The correspondence and dealings relied upon by the plaintiffs do not amount to such an acceptance. If, however, the Court should not come to this conclusion, then we submit that there is no proof of his having ever acted otherwise than according to his duty; for in order to make out against him a breach of trust, supposing the trust to * 575 have been accepted, the * respondents must show it to have been impossible that Mr. Richardson, as a man of the world, could have considered it advantageous, having regard to the state of the family, for the fund to remain in Sir William Magnay's hands.

The respondents' whole case is, that Mr. Richardson had the means of knowing it to have been imprudent to leave the money in Sir William Magnay's hands. We deny the fact, and we also deny the liability of Mr. Richardson if the fact were established. Even if Mr. Richardson knew in 1846 that Sir William Magnay's affairs were in a state of peril, it does not follow that he was bound to consummate Sir William Magnay's ruin by calling on him for payment. *Ward v. Ward. (a)* The only obligation was, to do what the trustees considered advantageous.

[THE LORD JUSTICE KNIGHT BRUCE. — Suppose one of two trustees thought it proper to exercise a discretion in a particular way, and the other differed, would it be the duty of either to take proceedings?]

We submit that it would not, and that no Court of Equity would have interfered with the discretion of the trustee in such a case as the present. Up to 1846 there is no ground alleged for imputing liability to Mr. Richardson, for the bill states that Sir William Magnay was then able to pay. We must look therefore at the time when the plaintiff first contends that the money should have been called in. The proposition is, that the trustees ought, in 1846, to have deemed it advantageous to call in the money, and that because they did not they are personally liable.

(a) 2 H. L. Cas. 777, n.

[THE LORD JUSTICE KNIGHT BRUCE. — Do not the respondents contend that Mr. Richardson absolutely refused to exercise a discretion ?]

Even then it would be necessary to show that it was necessary for him to exercise * a discretion. Nothing was * 576 ever said by the plaintiff to show a necessity for calling in the money ; nor can any case be found where trustees were held liable for non-exercise of such a discretion. In *Buxton v. Buxton* (a) it was held, that a difference of opinion between executors does not prevent one from exercising his discretion. All the members of the family had more means of knowledge than the trustee on whom they seek to fix the loss. Suppose Mr. Richardson had deemed it advantageous to call the money in, but the widow and daughters had objected, could he have called it in ? No responsibility rests on a trustee who is not the absolute *dominus* of the power. If trustees are armed with authority which the *cestuis que trustent* have not, the latter may complain of the trustee forbearing to act ; but if the trustee can only act by doing that which the *cestuis que trustent* can do, there is no ground for complaint. Now, here it was as competent for the plaintiff to sue Sir William Magnay as it was for Mr. Richardson to do so, the remedy being equitable only. Moreover, there has been acquiescence from 1837 to 1849, and the abortive notice of 1846 only strengthens the case of acquiescence.

Mr. Bacon, in reply.

Judgment reserved.

August 3.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the defendant Mr. Richardson having died before the decree under appeal was made, — the only appellants being his executors, who are defendants in that character merely, — and Mr. Richardson having been survived by the late defendant Mrs. Magnay (who was an executrix of the late Alderman Magnay and a trustee * of * 577 the deed of the 22d October, 1832, on which the suit is founded), and Sir William Magnay, in consequence of their deaths,

(a) 1 Myl. & Cr. 80.

being at present, and having, when the decree was made, been, the sole legal personal representative of the late Alderman Magnay, the single question for our decision is, whether, under the deed of the 22d October, 1832, Mr. Richardson incurred a personal liability and became subject to a pecuniary demand for which his assets are answerable in this suit. If he did not, the bills, so far as the appellants are concerned, may and ought to be dismissed, for they certainly are not trustees of or under the deed in any sense; and, as I have said, the testator Alderman Magnay is represented by Sir William Magnay, a defendant before the Court.

That the plaintiffs are bound by the deed is clear, for among the numerous persons who executed it was Miss Ellen Magnay, who became afterwards Mrs. Paddon, and died in the year 1848. She executed it when of full age, and before she married; and the plaintiffs, who all claim merely through or under her — by virtue, that is to say, of her marriage, and an instrument executed by her in 1837, after her execution of the deed of 1832 — do not nor could deny that their rights are regulated by the deed of 1832, on which the bills before us are, I repeat, founded altogether, and of which, if the late defendant did not accept the office of one of the trustees, his estate certainly is not liable in this suit. But he never executed the deed, nor am I satisfied that he accepted the office of a trustee of it. Perhaps, however, an acceptance of the trust ought (though I do not assert that it ought) to be ascribed to him. The bills and decrees are based on the hypothesis that, having accepted that office, he failed in the performance of a duty incident to it, and that the plaintiffs are entitled to complain of the failure.

* 578 * Now, assuming Mr. Richardson to have accepted the office, I do not find it alleged that he failed in the performance of any duty incident to it, except the duty, which it is insisted was incumbent on him, of requiring from Sir William Magnay payment of part or the whole of what remains due from that gentleman of the 20,000*l*, in question, and in default of payment proceeding by suit in equity with a view to compel it.

Was such a duty incumbent on Mr. Richardson? In considering this point it must be remembered, that the debt in question was not as to the whole or any part of it recoverable except by a suit in equity; that Sir William Magnay in a sense, if not in every sense, was originally and has continued to be a trustee of

the deed of 1832, which he executed ; that, so far as he was appointed a trustee of it, he must be taken to have accepted that office from the beginning ; that Mrs. Magnay, who executed the deed also, and lived for some time after the commencement of the present litigation, was certainly a trustee of the deed of 1832 who accepted that office ; that she, while living, was, and others besides the Paddon family are and have been, all along interested in the sum due from Sir William Magnay ; and that one of the material passages in the 12th clause of the deed is, " Until the said trustees shall deem it advantageous to invest the same sum of 20,000*l.* in the parliamentary stocks or public funds of Great Britain, or upon real or other security, and shall require the said William Magnay to pay the same, and then the same sum shall be paid by the said William Magnay by three equal instalments, at the expiration of six, nine, and twelve calendar months."

It must be borne in mind also, that it is perfectly manifest (at least I may state my clear and entire conviction to be) that for no purpose of the controversy can * any default or * 579 omission upon the part of Mr. Richardson, previous to the year 1846, be rationally or arguably alleged. The only questions reasonably raisable against him and his estate, as I conceive, are : 1st. Whether he accepted the trusteeship of the deed of 1832, a point which, without giving any opinion upon it, I assume against the appellants ; and 2d, whether Mr. Richardson, knowing what he knew, did, after the year 1845, so conduct himself as to make him, under the deed of 1832, liable personally to the plaintiffs at the time when, in November, 1849, the original bill was filed, or when, in the next year, it was amended for part of the 20,000*l.*

These things being so, I cannot think that either the knowledge and information which, after the year 1845, Mr. Richardson appears to have acquired or had concerning Sir William Magnay's circumstances, or the whole or any of the facts in evidence, rendered it incumbent on him (though viewed as a trustee of the deed of 1832) to take any course that he did not take as to the debt in dispute or any part of it, at least until the stoppage of Mrs. Magnay's income under the deed, which stoppage took place, as I collect, in June, 1849, some five or six months before the filing of the original bill. It is not, in my opinion, shown that at

any time before June, 1849, Mr. Richardson knew or had notice, or ought to have been aware, that it would, if in fact it would, at any time before June, 1849, have been "advantageous," according to the true meaning of the deed, to call in what remained due of the 20,000*l.* or any portion of the amount.

But it has been said, that Mr. Richardson declined to exercise any discretion upon the subject. This, however, if accurate, is not, for any present purpose, in my opinion, material, as * 580 upon the assumption that he was bound to * exercise, and did exercise, a discretion, there is, I repeat, in my judgment, no proof that, before June, 1849, he was practically wrong, nor was he at any time, as I have said, the sole trustee of or under the deed.

I assume that, in June, 1849, it became to Mr. Richardson's knowledge "advantageous" to procure payment of the debt, if possible. But the materials before the Court satisfy me, that the plaintiffs have not by means, or in consequence, of any omission or conduct which in or after June, 1849, took place on Mr. Richardson's part, sustained any loss or damage.

There is also another view of the dispute to which I referred during the argument. I think that if Mr. Paddon had been the only plaintiff in this litigation, it must have failed against the appellants. For Mr. Paddon was of full age at the time of his marriage in 1837, and was not then, nor has since at any time been, under any disability; and if it became right to sue Sir William Magnay, it was competent to Mr. Paddon himself to proceed by suit against Sir William Magnay, and other proper parties, for the purpose of obtaining payment by Sir William Magnay of what it was right that he should pay.

With regard to the children of Mr. Paddon, I assume that their case ought not to be prejudiced by the circumstance, that he is a plaintiff with them. But although Mr. Paddon makes mention of his wife and child, or wife and family, in the correspondence, it is not, in my opinion, shown, that before the commencement of the litigation, Mr. Richardson was informed, or had notice, of the marriage settlement or marriage articles under which the infant plaintiffs claim, or of the fact, that any one of them had * 581 any interest or title. It seems to me, * therefore, that the infants cannot, in this suit, be heard to complain against

Mr. Richardson, or the appellants, of any thing of which Mr. Paddon ought not to be heard to complain against Mr. Richardson or the appellants.

For the reasons and in the circumstances that I have mentioned, I am of opinion that the appellants should not be ordered to make any payment, or charged with any costs, unless perhaps their own, and those of their testator Mr. Richardson, and that the bills should, as against Mr. Richardson and the appellants, be dismissed; a conclusion, I apprehend, to be consistent with *Mucklow v. Fuller*, (a) *Buxton v. Buxton*, (b) *Ward v. Ward*, (c) *Styles v. Guy* (d) and *Rowley v. Adams*, (e) nor rendered less right by the fact, that although there was a personal representative of Mrs. Magnay before the Court in that character when the decree was made, it does not charge Mrs. Magnay or her assets.

THE LORD JUSTICE TURNER. — I am also of opinion, that this bill ought to be dismissed as against the late defendant Richardson and his representatives; and my learned brother having fully explained the case, it is unnecessary for me to do more than to state the grounds upon which, after a careful perusal of the papers, I have arrived at that conclusion; the more so, as the case, although spread over a vast mass of paper, depends, in my judgment, upon a few short points.

The first question in the case is, whether Mr. Richardson ever accepted the trusts of the deed of arrangement. *Look- *582 ing to the passages read from his answers, and to the evidence, both oral and documentary, I think the fair conclusion to be drawn is, that he did accept those trusts;¹ and, at all events, I think that we should not be justified in disposing of the case, upon the ground of his not having done so without some further inquiry. I assume, therefore, that Mr. Richardson became, in every sense, a trustee under the deed of arrangement.

The question then to be determined is, whether there has been any such neglect or default on his part as to render him liable to the plaintiffs for their share of the trust funds in question, for it is not pretended that he personally received any portion of those

(a) Jac. 198.

(b) 1 Myl. & Cr. 80.

(c) 2 H. L. Cas. 777, n.

(d) 1 Mac. & Gor. 422.

(e) 2 H. L. Cas. 725.

¹ See *Lewin Trusts* (5th Eng. ed.), 162; *Doe v. Harris*, 16 M. & W. 517.

funds. In truth, the question is still more narrow. It is, whether Mr. Richardson, by reason of any neglect or default on his part, became liable to the plaintiff John Edward Paddon, there being no pretence for saying, that Mr. Richardson ever had notice of the settlement on the marriage of the plaintiff Paddon and his late wife, so as to constitute him, if he could be so constituted, a trustee for the infant plaintiffs.

The object of this suit is to charge Mr. Richardson, a trustee, for wilful neglect or default. In such cases, the first consideration must be, what was the nature of the trust? This is not the ordinary trust to collect and get in trust moneys. It is a trust connected with a discretion to be exercised by the trustees upon the question, whether the trust moneys shall be called in or not. Where such a discretion is to be exercised, the ordinary rules by which this Court is governed in charging trustees for neglect or default have, as I conceive, but little, if any, application. In the ordinary cases, it is the duty of the trustees to get in the funds,

and the Court charges them for neglecting that duty; but * 583 where a discretion is given * to trustees upon the question, whether the funds should be got in or not, it is the duty of the trustees not to call them in, if in the exercise of their discretion they are of opinion that it is inexpedient to adopt that course. In cases of this latter description, it is, as I conceive, incumbent upon those who seek to charge a trustee to establish a case of misconduct on his part. We have to consider, therefore, in the first place, whether the plaintiffs have established such a case against Mr. Richardson. In my opinion they have failed to do so. The evidence, indeed, shows, that after 1846, up to which time the bill itself represents Sir William Magnay, in whose hands the trust moneys were, to have been solvent, and there could therefore be no occasion for calling in the funds; that after 1846, Sir William Magnay was known to Mr. Richardson to be endeavouring to borrow money, but it fails to show that the pressure upon him was more than temporary. The causes of the pressure are stated, and in some of the letters returning prosperity is alleged.

In such a state of circumstances it cannot, I think, be said that Mr. Richardson was bound to call in the money, or that there was misconduct on his part in not having done so, more particularly when the demand on him to do so was made by one only of several *cestui que trusts*, and the correspondence afforded reasonable

ground to conclude that the others did not concur in that request, and when, so far as I have been able to discover, no statement was made to him that his co-trustees were willing that the request should be complied with.

It was urged, however, on the part of the plaintiffs, that Mr. Richardson refused to exercise any discretion, but I do not think that this is by any means established in evidence. What occurred seems to have been this: In 1846, Mr. Paddon applied to Richardson as executor * and trustee under the will, and * 584 Mr. Richardson answered that he considered that his duties as executor and trustee under the will had long ago terminated. Mr. Paddon replied, that he had placed himself in office again under the deed of arrangement, to which Mr. Richardson answered, that the affairs had for so many years been under the control of Sir William Magnay, at the request and by the consent of all parties interested, that he must refer him to Sir William Magnay for further information, and here the matter rested until very shortly before the filing of this bill. It is clear that the family had in truth dealt with Sir William Magnay alone. Except on one or two occasions, on matters connected with the widow's annuity, Mr. Richardson had never been applied to. He had not been consulted on the marriages of the daughters or with reference to the sums which were paid to them on those occasions, or on any other matter connected with the trust; and surely, under these circumstances, it was not unreasonable on his part to refer Mr. Paddon to Sir William Magnay. Could the Court have charged him with the 4000*l.* if the bill had been filed immediately after the correspondence to which I have referred? I think it certainly could not; and if not, can the plaintiffs' case be improved by the delay?

There is yet another difficulty in the case on the part of the plaintiff John Edward Paddon, whose interests alone, for the reasons I have stated, we have here to consider. These trust moneys were recoverable only in equity. The bill is in effect to charge Richardson and his estate for a breach of trust in having permitted them to remain in the hands of Sir William Magnay; but if there was this breach of trust, why did not the plaintiff John Edward Paddon himself sue to recover the moneys? He was competent to do so, and I am at a loss to see what right he

* 585 can have to make his trustee liable * for not having done what he might have done for himself.

It is upon these grounds I think this decree must be reversed, and the bill dismissed against Richardson and his executors; but I think that the conduct of Richardson justified inquiry, and that the dismissal therefore should be without costs.

PARR v. APPLEBEE.

1855. July 24. August 3. Before the LORDS JUSTICES.

Registered first mortgagees of a ship with power of sale took from the mortgagor, by an unregistered document, a declaration that the mortgage should be a security, not only for the mortgage debt, but for such sums as might for the time being be due from the mortgagor either alone or with any partner to the mortgagees or their firm, however composed. Subsequently another incumbrancer took a registered mortgage expressed to be subject to the first mortgage but not referring to the unregistered charge, of which, however, the last mortgagee did not deny having had notice, when he took his security. *Held*, that the unregistered document was not merely a further charge, but a new security, and that the shipping Act excluded it from priority over the last mortgage.

THIS was an appeal from the decision of the Vice-Chancellor of the Duchy of Lancaster in favour of the validity of an unregistered charge on a ship.

By an indenture of the 29th May, 1851, duly registered under the shipping Acts then in force, John Parker Hall, one of the defendants, mortgaged a ship called the Lord Ribblesdale to Mr. Stansfield, one of the plaintiffs, to secure to the plaintiffs Parr, Lyon, and Stansfield, who were bankers at Liverpool, the repayment of a sum of 1600*l.*; but in the proviso for redemption the date by accident was left in blank. There was a power of sale in the usual terms in default of redemption on this unspecified day.

By an agreement dated the 19th October, 1854, executed by Mr. Hall but not registered, it was agreed that the former deed of the 29th May, 1851, should be a security to the plaintiffs,

* 586 not only for the payment of the * amount thereby secured,

but also for such sums as should from time to time be owing from Mr. Hall, either alone or with any partner, to the plaintiffs or their firm, however it might be composed.

By an indenture dated the 17th February, 1855, duly registered according to the shipping Acts then in force, the defendant Hall mortgaged the ship to Messrs. Applebee and Thompson, two other defendants, for 25,000*l.*, subject to the mortgage of the 29th May, 1851, but without referring to the charge of 19th October, 1854.

The defendant Hall having stopped payment, the ship was sold by arrangement, without prejudice to the question of the priority between the last mortgage and the unregistered charge of the 19th October, 1854, of which the last mortgagees did not deny having had notice when they took their security.

The Vice-Chancellor decided in favour of the priority of the unregistered charge over the last incumbrance.

Mr. Baily and *Mr. Little*, for the plaintiffs. — The plaintiffs had a power of sale created by a validly registered deed, and the defendants, the last mortgagees, took with notice of the possibility of the ship being converted into money, and of the proceeds, which would not be subject to the shipping Act, being charged by an unregistered incumbrance. It would therefore have been incumbent on them to inquire of the plaintiffs, who were trustees for sale, whether there was any incumbrance on the moneys to be produced by the sale, and they would take, subject to such incumbrance (if any), independently of notice. It is unnecessary, however, to consider this, as express notice is not denied. They have therefore no * possible equity, and the question * 587 is merely, whether the shipping Act affects the proceeds of a ship which has been sold under a provision for that purpose contained in a duly registered deed. Now, there is not a word in the shipping Act as to registering a claim on the purchase-money of a ship which has been duly registered, and the Court will not, in contravention of plain equities of the parties, extend the provisions of the Acts. In *McCalmont v. Rankin*, (a) the Lord Chancellor said, “ Then it has been most elaborately argued, that I might and ought to give effect to the transaction as regards the proceeds of the vessel, although I cannot affect the vessel itself. I do not lay

(a) 2 De G., M. & G. 403-424.

down any rule that parties cannot authorize a ship to be sold, and direct in what manner the money shall be applied." So in *Armstrong v. Armstrong*, (a) it was held, that the policy of the Ship Registry Act, in disregarding interests not appearing on the register, was inapplicable both to the money arising from the sale of a ship and to the produce of the freight; and that where a party who appeared on the registry to be the absolute owner of a ship entered into an agreement for valuable consideration, admitting he was a trustee, and engaging to sell the ship and hand over the produce to the true owner, the Court, notwithstanding the Ship Registry Act, would enforce the agreement. The Master of the Rolls said, " My opinion is that the agreement here does not give any interest in the ship, but it is an agreement that at the expiration of the period mentioned Thomas Cassop Armstrong is to sell the shares and pay over the proceeds thereof according to the will of Thomas Armstrong." " I may add that the case of *Prouting v.*

Hammond (b) appears to be a distinct authority at law for * 588 the same proposition as I am laying * down here. In that case the Court of Law expressly held, that the navigation laws did not prevent an action of assumpsit to recover the money from a person who had sold the ship and had the proceeds in his hands. That appears confirmed by the view which Lord St. LEONARDS took in the case of *McCalmont v. Rankin*, to which I have already referred." *Hughes v. Morris*, (c) which may be relied upon on the other side, is completely distinguishable from this case. The contest there was between an unregistered and a registered claimant, whereas here both the contending parties are on the register, and the only question is as to their respective rights. It is not necessary that the amount secured should be stated in a mortgage under the shipping Acts, any more than in an ordinary mortgage. The second mortgagee takes subject to the amount due on the first mortgage, whether on a further charge or otherwise, and for that reason he is in ordinary cases advised to inquire of the first mortgagee as to the amount due on his security.

[THE LORD JUSTICE KNIGHT BRUCE. — Does the validity of a further charge on a ship depend on the original mortgage containing a power of sale?]

(a) 21 Beav. 78, 88, 90. (b) 8 Taunt. 688. (c) 2 De G., M. & G. 349.

We submit that the power at all events removes any doubt. Suppose the case of a trust of a ship for sale, and then an assignment of the proceeds for the benefit of various *cestuis que trust-ent*, would not that be valid?

They also referred to *Ladbroke v. Lee*. (a)

Mr. Selwyn and *Mr. Cairns*, for the appellants.—The simple question here is, whether a second mortgage of a ship requires to be registered, for this is not a mere further charge, the persons interested in the first and second security being possibly different. That point * is, we submit, incapable of reasonable argument. The enactments are positive; and it has been conclusively decided under them, that there can be no such thing as an equitable mortgage of a ship. The Vice-Chancellor proceeded on the fact of notice, which has been always held immaterial. There never could have been a sale under the power, for between the first mortgage and a sale stood the appellants' right to redeem. They were entitled to say, that the ship should not be sold under the power. The provisions of the shipping Act show, that successive mortgages are contemplated by it, and that they are all to be registered. (b) Suppose there were

(a) 4 De G. & Sm. 106.

(b) The following are the material provisions of the Act referred to, which was that in force at the date of the transactions in question, omitting inapplicable words:—

8 & 9 Vict. c. 89, § 34. "That when and so often as the property in any ship or vessel, or any part thereof, belonging to any of her Majesty's subjects shall, after registry thereof, be sold to any other or others of her Majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity."

Sect. 38. "When and so soon as the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale or other instrument shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel, in manner hereinafter mentioned."

Sect. 39. "When and after the particulars of any bill of sale or other instru-

* 590 * a first mortgage for 10*l.*, with a power of sale, and then an unregistered contract for sale of the equity of redemption. According to the respondents' argument, that would be good, because the name of the purchaser was already on the register. Independently of all other arguments, the blank as
 * 591 to the time for the exercise of * the power of sale would be sufficient answer to the plaintiffs' case.

They referred to *Follett v. Delany*, (a) and *Coombes v. Mansfield*. (b)

ment by which any ship or vessel, or any share or shares thereof, shall be transferred shall have been so entered in the book of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry ; " " and in case the particulars of two or more such bills of sale or other instruments as aforesaid shall at any time have been entered in the book of registry of the said ship or vessel, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale or other instrument were entered in the books of registry ; " " and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are hereby required to indorse upon the certificate of registry of such ship or vessel the particulars of that bill of sale or other instrument under which the person or persons claims or claim property, who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid ; " " and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and comptroller, and they are hereby required, to indorse upon the certificate of registry the particulars of the bill of sale or other instrument to such person or persons as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this Act that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appear to claim the same property or to claim security on the same property in the same rank and degree, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid."

(a) 2 De G. & Sm. 235.

(b) 3 Drew. 198.

Mr. Baily, in reply.

Judgment reserved.

August 3.

THE LORD JUSTICE KNIGHT BRUCE.—What I should have thought the right mode of disposing of this case, if the plaintiffs' second security (that of 19th October, 1854) had been merely for debts due, and to become due to Mr. Stanhouse exclusively, or exclusively to the persons or any one or more of the persons for whose benefit the plaintiffs' first security (that of 29th May, 1851) was made to Mr. Stanhouse, or merely for debts due and to become due from Mr. Hall exclusively, I need not say, for such a state of circumstances is not before us.

Again, it is not requisite for me to say what my conclusion would have been if the security of October, 1854, had been merely upon the produce of a sale of the vessel in question, if one should take place under the power of sale contained in the earlier security, for the case is not so, since the instrument of 1854 professes to charge the ship itself, nor has it been, if it could have been, sold under that power of sale. It was sold with the assent and concurrence of all persons claiming to be interested as I have collected.

*The power of sale not having been, if it could have * 592 been, exercised, and not being now exercisable, seems to me of no moment or materiality between the present litigants. And that a power of sale differs very much from a trust for sale needs not to be stated. There was not a trust for sale. If there had been, it might not or might have varied the controversy.

In the actual circumstances of the case the security of October, 1854, appears in my judgment to be, so far as the rights and interests of the appellants in the vessel and her price are concerned, merely a second mortgage of the vessel, standing exactly on the same footing as if it had been made by Mr. Hall to a stranger connected neither with the plaintiffs nor with the appellants, for the single purpose of securing a debt due to that stranger from Mr. Hall. In such a state of things the security would, under the Ship Registry Act, have been void against the appellants as far as the vessel and her price are concerned; and so, in the existing state of things, it is, I think, void against them as far as

the vessel and her price are concerned, which price must, in my opinion, to the extent at least of the appellants' demand under the registered and effectual instrument of 1855 (after satisfying what remains due on the first mortgage), be applied as if the security of 1854 had not existed, — a conclusion not (I conceive) necessarily inconsistent with the recent decision at the rolls in *Armstrong v. Armstrong*, (a) — a case which may possibly be brought hither, and I desire to be understood as intimating neither assent nor dissent concerning it.

THE LORD JUSTICE TURNER. — Without entering into the question whether a mortgage of a ship, exclusively for the * 593 benefit of parties interested * under a prior mortgage, and confined, if it can be confined, wholly to the proceeds of a sale to arise under the prior mortgage, would or would not require registration under the provisions of the 8 & 9 Vict. c. 89, I am satisfied that the mortgage in question in this suit — extending, as it may, for the benefit of other parties, and purporting, as it does, to affect the ship itself — did require such registration, and that this decree therefore cannot be upheld.

Having regard to the position of the case of *Armstrong v. Armstrong*, (a) which may possibly come before us on appeal, I do not think it right to enter more at large into the case, or to give any further opinion upon it, as it would be difficult to do so without, in some degree at least, prejudicing that case.

* 594

* SALOWAY v. STRAWBRIDGE.

1855. November 12. Before the LORDS JUSTICES.

A power of sale and of giving valid receipts for the purchase-money was, in a mortgage in fee, given to the mortgagee, his heirs, executors, administrators, or assigns. *Held*, that the administrator of a transferee of the mortgage, with the concurrence of a trustee to whom the heir of the mortgagee had conveyed the legal estate in trust for the administrator, could validly exercise the power, and enforce a specific performance of an agreement for a sale under it.¹

(a) 21 Beav. 78.

¹ See *Lewin Trusts* (5th Eng. ed.), 319, 431; *Perry Trusts*, §§ 340, 494,

THIS case came on upon appeal from a decision of Vice-Chancellor WOOD, reported in the 1st volume of Messrs. Kay and Johnson's Reports. (a)

The suit was one by a vendor for specific performance of a contract for sale, and the only question was, whether the vendor could validly exercise a power of sale contained in a mortgage.

The mortgage was made by a deed dated the 9th February, 1832, whereby freehold hereditaments were conveyed to the use of Archelaus Hodges, his heirs and assigns, subject to redemption, and to a proviso that, in case of default in payment of the mortgage money, it should be lawful for the said Archelaus Hodges, his heirs, executors, administrators, or assigns, at any time or times thereafter, on giving six calendar months' notice in writing to the mortgagor, his heirs, executors, administrators, or assigns, to sell and dispose of the mortgaged hereditaments as therein mentioned; and it was thereby declared that all contracts which should be entered into, and conveyances and assurances which should be executed by the, said Archelaus Hodges, his heirs, executors, administrators, or assigns, for the purpose of effecting the sale of the said hereditaments and premises, or any part thereof, should be valid and effectual in the law to all intents and purposes whatsoever, and that the receipts in * writing of the said * 595 Archelaus Hodges, his heirs, executors, administrators, or assigns, for the money for which the said hereditaments and premises, or any part thereof, should be sold, should be good discharges.

By an indenture dated the 14th April, 1835, the mortgage debt was transferred to Ebenezer Saloway, and the mortgaged hereditaments were assured unto and to the use of the said Ebenezer Saloway, his heirs and assigns for ever.

Ebenezer Saloway died on the 29th December, 1846.

On the 27th March, 1851, letters of administration of the goods and chattels of the said Ebenezer Saloway, with the will annexed, were granted to the plaintiff; and by an indenture dated the 8d November, 1853, Samuel Saloway, the heir-at-law of the said

495; Lane v. Debenham, 11 Hare, 188; Titley v. Wolstenholme, 7 Beav. 425; Sugden V. & P. (14th Eng. ed.), 65, 66; Ashton v. Wood, 3 Sm. & Gif. 436. A power of sale contained in a mortgage of real estate may be executed after the mortgagor's death. Varnum v. Meserve, 8 Allen, 158.

(a) Page 371.

Ebenezer Saloway, at the request of the plaintiff as personal representative of the said Ebenezer Saloway, conveyed unto Benjamin Saloway, his heirs and assigns, all and singular the messuages or tenements and hereditaments comprised in the said indentures of the 9th February, 1832, and the 14th April, 1835, with their appurtenances, to hold the same unto and to the use of the said Benjamin Saloway, his heirs and assigns, upon trust nevertheless for the plaintiff or other the personal representative or representatives for the time being of the said Ebenezer Saloway, deceased, and to be conveyed and disposed of as he or they should direct or appoint.

The Vice-Chancellor decreed a specific performance, and the defendant appealed.

Mr. Bird for the appellant.

* 596 * *Mr. W. D. Lewis* for the plaintiff.

The following cases were referred to, in addition to those cited below: *Braybrooke v. Inskip*, (a) *Anonymous*, (b) *Wynne v. Griffith*, (c) *Pyrke v. Waddington*, (d) *Forbes v. Peacock*, (e) *Forster v. Hoggart*. (g)

Their Lordships held, that the objection to the title could not be sustained, and dismissed the appeal with costs.

* 597

* **BAKER v. BRADLEY.**

1855. July 25. November 5, 20. Before the LORDS JUSTICES.

Property was devised in trust for the testator's daughter and her assigns for her life, and to permit her to receive the income for her life for her separate use, with a direction that her receipts alone, or of some person or persons authorized by her to receive any payment of the income, after such payment should

(a) 8 Ves. 417.

(b) 6 Madd. 10.

(c) 1 Russ. 283.

(d) 10 Hare, 1.

(e) 1 Phil. 717.

(g) 15 Q. B. 155.

have become due, should, alone, notwithstanding her marriage, be good discharges. *Held*, that she was restrained from anticipation.¹

Transactions between parent and child, if in the nature of a settlement of property or rights, are regarded with favour, and not with minute regard to the consideration;² but if in the nature of bounty from the child soon after he attains majority, are to be viewed with jealousy, and as the subject of interposition of the Court to guard against undue influence.³

A mortgage was made of property by a father and son, immediately after the latter had attained his majority, to secure debts due from the father, to some extent incurred in improvements on the property and in maintaining and educating the son. The mother joined in the security, for the purpose of subjecting to it her separate estate, which she was, however, by a clause not recited or noticed in the mortgage, restrained from anticipating. The son had no separate advice on the occasion. *Held*, that the mortgage was not capable of being supported as a family arrangement, but was void as obtained by undue influence.

An agreement held impeachable under a bill not directly stating it.⁴

Field v. Evans, 15 Sim. 375, considered correct.

THIS was the appeal of the plaintiff from the dismissal with costs of the bill by Vice-Chancellor STUART. The case is reported below in the 2d volume of Messrs. Smale & Giffard's Reports, (a) where the facts are fully stated. The following summary of them is transferred to this place from the judgment of Lord Justice TURNER.

The bill was filed by William Baylis Baker for the purpose of having a mortgage, dated the 2d of September, 1848, to the defendant J. Bradley, for securing the sum of 1300*l.* and interest, and another mortgage of the same date to John Lovegrove (now vested in the defendants Thomas Cuff Adams, Joseph Lovegrove, and William Cottier, his representatives) for securing the sum of 500*l.* and interest, declared to be absolutely void as against him, and delivered up to be cancelled, and for the purpose of

(a) Page 531.

¹ See 2 Jarman Wills (3d Eng. ed.), 24 in note; Schouler Dom. Rel. 197, 198; 1 Lead. Cas. in Eq. (3d Am. ed.) [423] 524-526.

² Sugden V. & P. (14th Eng. ed.) 276 and cases in n. (g); Wright v. Vanderplank, 2 K. & J. 1; 8 De G., M. & G. 133; Hartopp v. Hartopp, 2 Jur. N. S. 794; Bosville v. Middleton, 29 L. T. 341; Jenner v. Jenner, 2 Giff. 232.

³ See 1 Story Eq. Jur. §§ 309, 309 a, and cases cited; Schouler Dom. Rel. 375; 3 Lead. Cas. in Eq. (3d Am. ed.) 113 [489]; Jenkins v. Pye, 12 Peters, 241; Taylor v. Taylor, 8 How. U. S. 183; Slocum v. Marshall, 2 Wash. C. C. 397; Savery v. King, 5 H. L. Cas. 627.

⁴ See 1 Dan. Ch. Pr. (4th Am. ed.) 327, 328.

* 598 having it further declared that * another mortgage, dated the 28th of October, 1850, to the defendant Joseph Lovegrove, for securing the sum of 700*l.* and interest, ought to stand as a security against him for so much only of the 700*l.* as was due from him to the defendant Joseph Lovegrove at the date of that mortgage.

Charles Baker and Ann his wife, the father and mother of the plaintiff, were also made defendants to the suit.

William Baylis by his will dated the 25th day of August, 1835, gave certain messuages and hereditaments of which he was seised to Thomas Clutterbuck Croome, as follows: "To hold the same to the said Thomas Clutterbuck Croome, his heirs and assigns for ever, to the use of and in trust for my said daughter Ann Baker and her assigns for and during the term of her natural life, and to permit and suffer her to receive the rents and income to arise therefrom during the term of her natural life separate and apart from her present or any future husband, and not subject to his debts, engagements, or control; and I declare that the receipts of my said daughter Ann Baker alone, or of some person or persons authorized by her to receive any payment of the said rents and income, after such payment shall have become due, notwithstanding her said present or any future marriage, shall alone be good discharges for the said rents and income, or for so much thereof as shall be thereby acknowledged to have been received. And from and immediately after the determination of the estate hereinbefore limited to the use of and in trust for the said Ann Baker for her life as aforesaid, then to the said Thomas Clutterbuck Croome and his heirs during the natural life of my said daughter, in trust to support the contingent uses and estates herein-

* 599 after limited, yet to permit and suffer * the said Ann Baker to receive and take the rents and income to arise from the said hereditaments during the term of her natural life as aforesaid, and from and immediately after the decease of the said Ann Baker, then to the use of and in trust for the said Charles Baker, if he shall survive the said Ann Baker, for and during the term of his natural life, to enable him to support himself and to support and bring up the children of the said Ann Baker; and in case the said Charles Baker should die in the lifetime of the said Ann Baker, and if she should marry any future husband who should happen to survive her, then to the use of and in trust for any future husband

of the said Ann Baker who may happen to survive her, for and during the term of his natural life; and from and immediately after the decease of the survivor of them the said Ann Baker and the said Charles Baker, and of any future husband of the said Ann Baker, if such future husband shall survive her, then to the use of all and every or any one or more of the children, grandchildren, or other issue of the said Ann Baker by the said Charles Baker, or by any future husband (such grandchildren, issue to be born before any appointment shall be made to them respectively), in such manner and form, and, if more than one, in such parts, shares, and proportions, and with such limitations over, or substitutions in favour of any one of the others of the said children, grandchildren, and issue respectively, and at such time or times, age or ages, day or days, and in such contingencies, and under and subject to such directions and regulations for maintenance, education, and advancement, and to such conditions as the said Ann Baker, notwithstanding her present or any future husband, at any time or times and from time to time by any deed or deeds to be signed, sealed, and delivered by her in the presence of two or more credible witnesses, to be with or without power of revocation and new appointment, * or by her last will and * 600 testament in writing or any writing in the nature of a last will and testament, or any codicil or codicils to be respectively signed and published by her in the presence of and attested by three or more credible witnesses, shall direct, limit, or appoint, or give and devise the same; and from and until default of and from time to time, and subject to such direction, limitation, and appointment, gift or devise, then to the use of and in trust for the child of the said Ann Baker, if only one, whether male or female, and for all the children of the said Ann Baker, both male and female, if more than one, and whether by her present or any future husband, to be equally divided between or among them, share and share alike as tenants in common and not as joint tenants, and the heirs of the body and several and respective bodies of the same children respectively lawfully issuing, with cross remainders in tail between and among such children of the said Ann Baker; and in default of such issue, then to the same uses, upon the same trusts, and for the same estates as are hereinafter devised to the said Thomas Clutterbuck Croome, to the use of and in trust for my daughter Mary Baylis and her children, and the issue of such

children ; and in default of issue of all the children of the said Ann Baker and of the said Mary Baylis, then to the use of and in trust for the said Ann Baker, her heirs and assigns absolutely." The testator then devised other estates to his daughter Mary Baylis upon similar trusts, and in default of children of the said Mary Baylis, then on the same trusts in favour of Ann Baker and her children, and failing children of Ann Baker, to Mary Baylis absolutely. He appointed Ann Baker and Mary Baylis executrixes of his will.

The testator died soon after the date of his will. The * 601 plaintiff William B. Baker was the only child of the * testator's daughter, the defendant Ann, the wife of the defendant C. Baker. He was an infant at the time of the testator's death, and attained twenty-one on the 25th of May, 1848. His mother, the defendant Ann Baker, was at this time about fifty-three years of age ; and his aunt, Mary Baylis, who had been married to Mr. Holder, was then a widow without children, and about forty-six years old.

During the minority of the plaintiff the defendants C. Baker and Ann his wife borrowed the sum of 1000*l.* of the defendant J. Bradley, and the sum of 500*l.* of John Lovegrove, a solicitor at Gloucester, upon mortgages of Mr. and Mrs. Baker's life-interests in the estates devised by the will of William Baylis (the defendant Ann Baker conveying her life-estate as if she was not restricted from anticipating) and the recitals of the will of William Baylis contained in the mortgages not referring to the receipt clause following the limitations to the separate use of the defendant Ann Baker and Mary Baylis.

It appeared, however, probable, that these recitals might have been copied from a previous mortgage of the life-interests to a person of the name of Carter, which was transferred to the defendant Bradley, and which had been settled by another solicitor, a Mr. Clutterbuck, who had acted for all parties in that transaction, there being the same omission in the recitals contained in this previous mortgage.

Part of the sum of 1000*l.* secured by Bradley's mortgage was (together with a further sum of 100*l.* advanced by him to the defendant Baker) further secured by an assignment of the defendant Baker's furniture, and both the sums of 1000*l.* and 500*l.* were also secured by policies of insurance upon Baker's life.

* From the evidence in the cause, it appeared that, even * 602 at this early period of the mortgage to Bradley, which was in the year 1844, the defendant C. Baker suggested to the defendant Bradley that his policy might be dropped in case the plaintiff, upon attaining twenty-one, would charge the 1000*l.* upon his interest in the estates, and that the defendant Bradley agreed to the suggestion.

John Lovegrove died in the month of March, 1848, and it appeared that both shortly before and after his death, and before the plaintiff attained twenty-one, the defendant Joseph Lovegrove (who was a solicitor and one of the executors of John Lovegrove) on behalf of himself and his co-executors, and of the defendant Bradley, entered into communication with the defendant C. Baker upon the subject of the plaintiff's charging the mortgage moneys due to Bradley and John Lovegrove's estate on his interest in the mortgaged premises. There did not appear, however, to have been any direct communication between the plaintiff and Lovegrove until the 30th of May, 1848, five days after the plaintiff had attained twenty-one.

On that day the plaintiff went with the defendant C. Baker, his father, with whom he was then living, to the office of Joseph Lovegrove, and there signed a memorandum, which recited that the plaintiff, under the will of the testator, after the decease of his mother and any husband she might leave surviving, subject to a power of appointment, was entitled to certain hereditaments therein comprised, and also to those devised to the said Mary Baylis. The memorandum also recited the indenture of the 28th of November, 1842, Lovegrove's mortgage, and also the indenture of the 11th of May, 1844, and Bradley's deed. It recited the loan of 1000*l.* upon the bill of * sale, and that 500*l.* * 603 was now due to the executors of Lovegrove and 1100*l.* to Bradley, and that a large proportion of the above sums had been applied by the father and mother of the plaintiff in his maintenance, education, and advancement in life, as he did thereby admit and acknowledge. The memorandum then proceeds as follows:—

“Now he the said William Baylis Baker doth hereby undertake, promise and agree to and with the said T. C. Adams, Joseph Lovegrove and William Cother the younger, and the said

J. Bradley respectively, that he the said W. B. Baker will, whenever thereunto requested by them the said T. C. Adams, J. Lovegrove and W. Cother the younger, and J. Bradley, or any or either of them, at his own costs and charges, make, do, execute and perfect all such acts, deeds and assurances as may be deemed necessary for securing to them respectively, all their respective executors, administrators and assigns, the repayment of the said several principal sums so respectively due as aforesaid, together with all interest now or hereafter to become due upon the same sums respectively, and for such purpose to convey and assure to them respectively; and to their respective heirs, executors, administrators and assigns, all his estate and interest whatsoever under the said will, and under any demise, limitation or appointment which has already been made or may hereafter be made by his said mother under or by virtue of the power or authority to her for that purpose given in and by the said will, and also all the estate and interest which he the said W. B. Baker may hereafter become entitled to under the said will by reason of survivorship or otherwise, the said T. C. Adams, J. Lovegrove, and W. Cother the younger, and the said J. Bradley, to take as to priority according to the dates of their several mortgages; and the said W. B. Baker doth hereby further undertake, promise, and agree that, in case the said T. C. Adams J. Lovegrove, and W. Cother the

* 604 * younger, and the said J. Bradley, should desire it, he the said W. B. Baker will, at his own costs and charges, and as soon as may be, raise, borrow or make, do and execute all necessary acts, deeds and assurances for the purpose of raising or borrowing upon security of the hereditaments and premises aforesaid such sum or sums of money as shall be requisite and necessary for paying to the said T. C. Adams, J. Lovegrove, W. Cother the younger, and J. Bradley respectively all principal and interest moneys which may be due to them respectively on the before-mentioned securities.

“ Dated this 30th day of May, 1848.

“ Witness,

“ W. B. BAKER.”

“ J. LOVEGROVE.”

After the plaintiff had signed this memorandum application was made to the defendant Bradley to advance the further sum of 200*l.*, which he agreed to do, and a deed of appointment by the plaintiff's

mother, in his favour, of the fee of the estates and two of the mortgage-deeds in question, viz., those of the 2d of September, 1848, were prepared. On the 24th of August, 1848, the engrossments of these deeds were read over to the plaintiff and his father at the office of Mr. Joseph Lovegrove. But it appeared that the plaintiff had no other adviser, and it was not even alleged that any advice was given to him as to any claims which his father had upon him, and no suggestion was made to him that his mother's life-estate was subject to any restriction against anticipation; the case of the defendants being, that up to this time, at least, it was not supposed by any of the parties that the will operated any such restriction.

On the 1st and 2d of September, 1848, the above-mentioned deed of appointment and the mortgage-deeds were executed, and the 200*l.* was advanced by Bradley. * The mortgage- * 605 deeds were both dated the 2d of September, 1848. One was made between Charles Baker and Ann his wife of the first part, the plaintiff of the second part, and John Bradley of the third part. It recited the will and the memorandum of the 30th of May, 1848, the plaintiff admitting that the sum of 1000*l.* was then due to Bradley, and 500*l.* to the executors of John Lovegrove, from Charles Baker and Ann his wife, together with a further sum of 100*l.* lent by J. Bradley to Charles Baker. By the first witnessing part of the deed (in consideration of 200*l.* paid by Bradley to Charles Baker and to the plaintiff) Charles Baker covenanted for the repayment of the same, and also that the estate of himself and his wife under the will should be charged therewith. By a further witnessing part it was expressed that in pursuance of the agreement and in consideration of the premises, the plaintiff thereby granted, conveyed, assigned, and confirmed unto Bradley, his heirs and assigns, all and singular the estates devised under the testator's will, including those firstly given to Ann Baker, and those secondly given to Mary Baylis, and all the estate and interest of the plaintiff comprised in the deed of appointment of the 1st of September, 1848, as a security for the sums of 1000*l.*, 100*l.*, and 200*l.*, making together 1300*l.* The deed contained a covenant on the part of the plaintiff to pay the above sums and interest, and a power of sale. The other mortgage-deed of even date was executed by Mr. and Mrs. Baker and the plaintiff in favour of the executors of Joseph Lovegrove to secure 500*l.*

The receipt clause by Mrs. Baker was omitted in the recitals of both the mortgage-deeds.

The policies of insurance for securing the mortgage moneys were then allowed to drop. The plaintiff afterwards,
* 606 * in the month of November, 1848, borrowed of a lady of the name of Mary Taylor a further sum of 300*l.* upon mortgage of his reversionary interest, and this mortgage was approved by a separate solicitor on the part of the plaintiff. It was dated the 4th of November, 1848.

Some time after the date of this transaction, and in the month of December, 1849, the defendant, Joseph Lovegrove applied to Croome, the devisee under the will who had possession of the title-deeds of the estates, for the delivery of them to the mortgagees, and in consequence of this application counsel was consulted on the will and advised that the life-interest of Mary Baker was subject to a restriction against anticipation. The fact of counsel having thus advised appeared upon the evidence to have become known to the plaintiff in the month of June, 1850.

In consequence of this opinion of counsel, the delivery of the deeds by Croome was not further pressed. Pending and subsequent to the application for the deeds, the plaintiff attempted to raise further moneys upon the security of his reversionary interest, through the medium of another solicitor, Mr. Howard, and ultimately of Mr. Lovegrove, but these attempts failed. It appeared that the plaintiff had at this time a copy of the will in his possession.

The plaintiff having failed in his attempt to raise further moneys, he and his father borrowed small sums from time to time of the defendant Joseph Lovegrove, some of which appeared to have been advanced to the father at the instigation of the plaintiff. Ultimately, having become embarrassed in their affairs, the plaintiff and his father applied to the defendant Lovegrove for an advance of 700*l.* to extricate them from their difficulties, and he
* 607 * agreed to make the advance upon the security of a mortgage, and upon the assurance of the plaintiff and his father that no advantage should be taken of the supposed defect pointed out by the opinion of counsel arising from the provision against anticipation. A mortgage, dated the 28th of October, 1850, was thereupon prepared and executed.

At the time of the execution of this mortgage it had not been

ascertained what payments were to be made on account of the plaintiff and his father, and the account as to the application of the 700*l.* was not therefore then settled. It was afterwards, in the month of December, 1850, settled between the plaintiff's father and the defendant Lovegrove, and the balance paid to the plaintiff's father. The account was subsequently sent to the plaintiff and acknowledged by him to be correct, with the exception of a very small item.

Subsequently to these transactions, and in the month of June, 1851, a portion of the furniture which had been assigned to the defendant Bradley was sold with his consent, and the proceeds, amounting to 108*l.* 15*s.* 6*d.*, were paid to the plaintiff's father, who thereupon gave to the defendant Bradley a substituted security by a deed dated the 21st of June, 1851.

The plaintiff also after these transactions attempted, through a Mr. Lediard, to raise money to pay off the existing mortgages, and some letters appeared to have been written by Mr. Lediard with reference to such proposed payment, but the attempt to raise the money ultimately failed in consequence of the difficulty arising upon the provisions of the will as to the alienability of the mother's estate. Application was also made by the plaintiff and his father to the defendant Bradley in the * summer or autumn * 608 of 1851 to reduce the interest of his mortgage.

On the 18th of May, 1852, the plaintiff filed his bill in the present suit, alleging that in the abstracts of the will of William Baylis, made with a view to the deeds of September, 1848, the proviso against anticipation by the said Ann Baker, as well as the similar proviso against anticipation by Mary Baylis, were entirely omitted, and that there was nothing on the face of such abstract to cause any suspicion that the original will of the said William Baylis did in fact contain any such proviso against anticipation, or that Ann Baker was in any way restrained and prevented from executing valid and effectual charges upon her life-estate under the said will. The bill stated that the " plaintiff was advised that such omission was a fraud upon the plaintiff, and that by reason of the youth and inexperience and want of legal advice, and also of the parental control exercised over him, with the full knowledge and concurrence of the defendants, and also by reason of such fraud, the two indentures of the 2d of September, 1848, ought to be declared null and void, and decreed to be delivered up to be cancelled, so far as

the plaintiff might be affected thereby." But the bill did not set out the agreement of May 30th, 1848.

The Vice-Chancellor held that the agreement was good as a family arrangement, and that the omission in the recitals in the securities of the clause in the will was immaterial, as that clause did not, in his Honor's opinion, operate as a restraint upon anticipation. His Honor doubted the correctness of the report of *Field v. Evans*. (a)

Mr. Elmsley and *Mr. Hoare*, for the appellant.

* 609 * *Mr. Elderton*, for Mr. and Mrs. Baker.

Mr. Wigram and *Mr. Selwyn*, for the defendant Bradley.

Mr. Malins and *Mr. Forster*, for the defendant Lovegrove.

Mr. Bacon and *Mr. Rogers*, for the other defendants.

The arguments were similar to those adduced below, which will be found fully reported in Messrs. Smale & Giffard's Reports.

The following authorities were referred to:—

On the question of the effect of the restraint upon anticipation: *Acton v. White*, (b) *Barrymore v. Ellis*, (c) *Medley v. Horton*, (d) *Field v. Evans*, (e) *Brown v. Bamford*, (g) *Re Ross's Trust*. (h)

(a) 15 Sim. 375.

(c) 8 Sim. 1.

(b) 1 Sim. & St. 429.

(d) 14 Sim. 222.

(e) 15 Sim. 375. The following extract from the minute book of the day was read:—

Vice-Chancellor of England.

Friday, 17th July, 1846.

FIELD v. EVANS.

Mr. Bilton, for plaintiff.

Cause and petition.

Settlement read by Court.

Question whether settlement contains a restraint against anticipation. [Cur. There is a restriction in this case.]

Enter evidence in cause.

Randall, for corporation of city of London, waives costs.

Cur. — Transfer certain parts referred to in petition to trustees. No order as to the rest. [As mentioned by *Mr. Cooper*.]

Costs of all parties out of the fund, except of Corporation, who waive them.

(g) 1 Phil. 620.

(h) 1 Sim. N. S. 196.

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* On the questions of parental influence and family arrangement: *Hatch v. Hatch*, (a) *Huguenin v. Baseley*, (b) *Wood v. Downes*, (c) *Carpenter v. Heriot*, (d) *Tweddell v. Tweddell*, (e) *Archer v. Hudson*, (g) *Thorner v. Sheard*, (h) *Hoghton v. Hoghton*, (i) *Bellamy v. Sabine*, (k) *Wallace v. Wallace*, (l) *Kennedy v. Green*, (m) *Maitland v. Irving*, (n) *Maitland v. Backhouse*, (o) *Hewitt v. Loosemore*, (p) *Wright v. Vanderplank*. (q)

On the question of pleading: *Espey v. Lake*, (r) *Ferraby v. Hobson*, (s) *Maguire v. O'Reilly*, (t) *Glasscott v. Lang*, (u) *Knight v. Majoribanks*, (v) *Price v. Berrington*, (w) *Wilde v. Gibson*. (x)

Judgment reserved.

November 20.

THE LORD JUSTICE KNIGHT BRUCE. — The bill in this case I understand to have been filed in the month of May, 1852; the plaintiff, who attained his majority on the 24th or 25th of May, 1848, having soon afterwards in that year, and in the year 1850, signed an agreement and executed certain deeds, which by way of suretyship for his father, professed to make, and (if equitably as well as legally valid) made the person and * property of * 611 the plaintiff liable for certain debts of his father (one of the defendants).

The main question in the cause is, whether, so far, these instruments bind the plaintiff legally and equitably, or are in equity void against him; a question in considering which it was right to endeavour to form an opinion as to the true construction of the will of his maternal grandfather, Mr. Baylis, with respect to the life-interest of the plaintiff's mother in the property in which her life-interest and his interest by way of remainder under the will

(a) 9 Ves. 292.

(b) 14 Ves. 273.

(c) 18 Ves. 120.

(d) 1 Eden, 338.

(e) Turn. & R. 1.

(g) 7 Beav. 551.

(h) 12 Beav. 589.

(i) 15 Beav. 278.

(k) 2 Ph. 425.

(l) 2 Dr. & War. 452.

(m) 3 Myl. & K. 699.

(n) 15 Sim. 437.

(o) 16 Sim. 58.

(p) 9 Hare, 449.

(q) 1 Jur. N. S. 932.

(r) 10 Hare, 260.

(s) 2 Ph. 255.

(t) 3 Jo. & Lat. 240.

(u) 2 Ph. 310.

(v) 2 Mac. & G. 10.

(w) 3 Mac. & G. 486.

(x) 1 H. L. Cas. 605.

were, by the instruments that I have mentioned, professed to be charged.

For if the life-interest of the plaintiff's mother under the will was alienable by her during her coverture, it is obvious, when we look at what had occurred before 1848, that her position, and that of her family, so far as liable to be affected by hers, were very different in and after April and May, 1848, from what a contrary state of things known to exist would have rendered them; and this, independently of the consideration not unimportant that her life-interest if alienable was made liable to exonerate the plaintiff and his property partially at least from the debts of her involved and embarrassed husband; but, if otherwise, of course not. And it is undisputed and unquestionable on the evidence, that the plaintiff became a party to each of the instruments of 1848, in the belief that her life-interest under the will was alienable by her during her coverture; and therefore, that she and her property and family were affected accordingly.

Having attentively considered Mr. Baylis's will, the view that I take of it is, that, as to the life-interest which it gave to Mrs.

Baker, the plaintiff's mother, it restrained her from anticipation during her coverture. These words, * "And I declare that the receipts of my said daughter Ann Baker alone, or of some person or persons authorized by her to receive any payment of the said rents and income after such payment shall have become due, shall alone, notwithstanding her said present or any future marriage, be good discharges for the said rent and income, or for so much thereof as shall be thereby acknowledged to have been received," seem to me, with the context, to have that effect; and this I should have thought even if the case of *Field v. Evans* had never been decided.

But I may observe, that the report of Mr. Simons, and the Registrar's Court Book of the day on which it was determined, seem to me to justify a belief that both the Vice-Chancellor of England and Mr. Simons saw the original or a copy of the instrument there in question, and I am disposed to think the report correct and trustworthy rather than otherwise, which I say not without having read the petition in that case; it was produced to us on the 25th of July last, I believe, with the Court Book, by Mr. Latham.

So reading the will of Mr. Baylis, I consider it to be established,

that to the instruments of 1848 the plaintiff became a party under a misapprehension, material and important in its nature, because in the belief that I have mentioned. The same view of the will — the view, that is, which I have said that I think erroneous — was perhaps taken, and perhaps honestly taken, in 1848, by some or all of the other parties to those instruments respectively. But the defendant Mr. Joseph Lovegrove, the mortgagee of 1850, and one of the mortgagees of 1848, is a solicitor, and was in that character professionally concerned for the other mortgagees in the transaction of 1848. Nor can any one of the parties to this suit, I conceive, deny * that in and before September, 1848, they * 613 all had at least constructive notice of the whole contents of the will. But the plaintiff, who, if in any part of the transactions of 1848 and 1850, he had any solicitor or adviser, had not any other than Mr. Joseph Lovegrove, and was not before the year 1850 apprised that the restraint on alienation existed, or might be reasonably contended to exist according to the correct construction of the will, was in 1848 caused or allowed to sign and execute the instruments of that year, under the impression, the erroneous impression, I repeat, as it appears to me, which I have mentioned.

There are, however, other circumstances damaging to the instruments, so far as they purport to make the plaintiff a surety. The deeds proceed on the notion of the clear validity of the appointment of the 1st of September, 1848, made by Mrs. Baker in the plaintiff's favour, an appointment which, if its validity or invalidity could and ought to be determined on the materials before the Court in the present suit, must, in my opinion, be deemed bad and worthless; for its motive and object seem to me to have been to make the inheritance of the property comprised in it subservient to the purposes of the father and his creditors in a transaction in which the mother and the son seem merely to have been used as the father's instruments under the guidance of Mr. Joseph Lovegrove, the lawyer of the father's creditors.

Now, the power under which the appointment was made extends to grandchildren, and, if it has not been well exercised, may be exercised perhaps hereafter so as to exclude the plaintiff. Again, the almost indescribable document of the 30th of May, 1848, prepared and attested by Mr. Lovegrove in that month, was gravely * treated in the following September as if it had * 614

bound the plaintiff, or been any thing more than waste paper as against him and his property.

He executed the deeds of September, 1848, under the false impression that the instrument of May was effectual against him, and I am not sure that any one of the parties to the eccentric arrangement of that year was in that year of a different opinion. But it seems impossible to suppose that Mr. Joseph Lovegrove could have believed in the truth of the strange suggestion, that the father had a demand on the son or his property for his maintenance, education, and advancement, nor of course is there or was there any pretence for saying that the father's expenditure on the property (however beneficial to it) created any demand between them. Assuredly neither the father nor Mr. Joseph Lovegrove ought to have endeavoured to induce the plaintiff to sign or execute, or ought indeed to have abstained from recommending him not to sign or execute, any one of the deeds of 1848. Of course the astonishing agreement of May is not a matter to be dealt with except as a thing prejudicing the case of the mortgagees of 1848, from whom it seems to me to take away such chance, if any, as they might otherwise have had, of retaining the plaintiff or his property in the position of surety for his father.

Upon the whole, if not independently of that agreement, yet certainly that agreement being taken into account, the plaintiff has, in my opinion, with respect to the disputed mortgage-deeds of 1848, established a case, on his part, of misapprehension, imprudence, inexperience, unadvisedness, ignorance, and subjection to unduly exercised influence, in all which Mr. Joseph Lovegrove's participation, and to all which his privity, must prevent the

* 615 other mortgagees from effectually contending that * they were not throughout apprised of the true circumstances: a case, I say, sufficient on these grounds, in my opinion, to render it incumbent on a Court of Equity to relieve the plaintiff and his property from all the obligations of suretyship for his father which were with such a remarkable want of propriety imposed on the plaintiff in 1848.

The same observations apply with equal force, or not importantly less strongly, to the security for 700*l.* of October, 1850. It was the duty of the defendant, Mr. Lovegrove, who at least after 1848, if not in and after 1848, had been acting as solicitor for the plain-

tiff, not to take that security from the plaintiff without affording him more information and better advice than he had, and so far as it affects him or his property by way of suretyship for his father, it cannot, in my judgment, be allowed to stand. It is true that *Mr. Rolt's* opinion upon the construction of Mr. Baylis's will was known to the plaintiff before July, 1850, and therefore before he gave the defendant, Mr. Lovegrove, the security of October, 1850, for 700*l.*; but the defendant Mr. Lovegrove, who made the plaintiff's mother a party to the security, and in the transaction treated her as not restrained from anticipation, cannot, in my opinion, support it against the plaintiff, on the ground that he then had notice either that she was so restrained or that the point was doubtful.

It was suggested in the argument that the transaction of 1848, impeached by the bill, might be supported against the plaintiff as amounting to a family arrangement. Now if, in the French language, he were described as having been well arranged in those operations, I should probably not dissent from the phrase, but I cannot agree that according to the sense ascribed by English Courts of Equity to the term "family arrangement," * or * 616 that according to *Pullen v. Ready*, (a) *Gordon v. Gordon*, (b) *Tweddell v. Tweddell*, (c) or any of the authorities cited in *Palmer v. Wheeler* (d) and *Harvey v. Cooke*, (e) and in Mr. Swanston's notes to *Davis v. Uphill* (g) and *Dunnage v. White*, (h) there was in the present instance, in 1848, a family arrangement, or an arrangement binding on the plaintiff, a witless lad, who in those transactions appears to me to have been a mere prey ensnared and plundered by hands from which he ought to have received guidance and protection.

It has, however, been contended on the part of some at least of the defendants that the bill contains at once too much and not enough, and omits to state or proceed on the only case, if any, capable of saving it from dismissal. To this, however, I cannot agree. True, the agreement of May, 1848, is, I believe, not mentioned in the bill, which contains broad and heavy imputations of fraud; but Mr. Bradley and Mr. Lovegrove rely in their answers upon the agreement, it forms part of the evidence, and there are

(a) 2 Atk. 587.

(b) 3 Swanst. 400.

(c) Turn. & R. 1.

(d) 2 Ball & B. 18.

(e) 4 Russ. 34.

(g) 1 Swanst. 136.

(h) 1 Swanst. 137.

facts stated by the bill sufficient, in my judgment, upon the pleadings and the evidence as they stand, to entitle the plaintiff to the decree to which I have alluded, and which will be more particularly mentioned. The bill, however, not drawn by any counsel now in the cause, is so long, and is otherwise framed in a manner so far from commendable, that originally I thought its contents sufficient to deprive the plaintiff wholly of his costs, at least from the commencement of the suit to the hearing of the appeal, and at

one time, accordingly, I considered that there should to
 * 617 the * present time be no costs given against any of the parties. But my impression now, as between the plaintiff and the defendant Mr. Lovegrove and the defendant Mr. Baker, is not so. My conclusion, after full consideration, being that the public interest equally and private justice require that the two latter should be charged in favour even of this plaintiff with his costs to this time, but by reason of the state of the pleadings to a limited amount only, that amount to be now fixed.

It was also contended for the defendants, the mortgagees, that the plaintiff, by confirmation or acquiescence, or both, has precluded himself from any title to relief if otherwise he could have had any; and that relief ought to be given to him, if at all, only on the condition of making good the life policies of insurance that were previously to the year 1851 allowed to drop or become extinct, on the faith, it was said, of the securities of 1848. But, subject only to what I shall say, there has, I think, been neither confirmation or acquiescence on the part of the plaintiff, whom I cannot, upon the evidence, consider as having been before May or June, 1850, made aware that his mother's restraint from anticipation existed, or that the question of its presence or absence was doubtful or arguable, nor do I think that he ever intended to relinquish or concede his right, if any, to relief against the securities which he had given.

Each of the policies was abandoned before April, 1850, and *Mr. Rolt's* opinion not having been given until May, 1850, the abandonment of the policies does not, I think, form any ground of complaint or of total or partial defence against the plaintiff, or for imposing any condition upon him. The plaintiff had a
 * 618 right to make * the mortgage to Miss Taylor, whatever his position as to the earlier securities, without mentioning which it would have been very improper for him to give a security

to Miss Taylor; and, subject to the qualification that I shall state, not any act or conduct of the plaintiff, subsequent to the time when he became first apprised of his true position and the real state of things, has occasioned any loss or damage or inconvenience to the defendants, or to any one or more of them. It is, however, true that in the year 1851 the plaintiff, then aware of *Mr. Rolt's* opinion, seems to have aided his father in obtaining Mr. Bradley's assent to the arrangements which, mentioned in the deed of June, 1851, were completed by that instrument. It seems to me, therefore, that it is right to require the plaintiff, as a condition of obtaining relief in this suit, to make good to Mr. Bradley the net produce of the sale of the effects sold, as in the deed stated, at least in the sense that I shall mention.

The result appears to me to be, that we should discharge the order dismissing the bill, that the plaintiff should submit to be bound by such order touching redemption or foreclosure as the Court may make, and should submit to pay to the defendant Mr. Bradley the sum of 108*l.* 15*s.* 6*d.* as part of the 1300*l.* in the pleadings mentioned, together with such interest as may be due to Mr. Bradley on so much of the 1300*l.*: that the plaintiff should pay to Mr. Bradley the 108*l.* 15*s.* 6*d.* on or before the 20th of February next, and that an account should be taken of what is due to Mr. Bradley for interest on so much of the 1300*l.*: that we should continue the injunction until further order, and declare the several instruments of mortgage or security of September, 1848, and October, 1850, void in equity against the plaintiff, save as concerning the indenture of the 2d * of September, 1848, * 619 to which the defendant Bradley is a party, so far, if at all, as that indenture is a security to the defendant Bradley for such, if any, part of the 1300*l.* as was *bond fide* advanced to and received by the plaintiff, and, save as concerning the indenture of October, 1850, so far as that indenture is a security to the defendant Mr. Lovegrove, for so much of the sum of 700*l.* mentioned in it as, independently of that indenture, formed a *bond fide* debt from the plaintiff to the defendant Mr. Lovegrove, or was advanced by him upon the plaintiff's express request: that there should be an inquiry whether any and what part of the 1300*l.* was *bond fide* advanced to and received by the plaintiff, and when and under what circumstances, and an account of what, if any thing, is due to the defendant Bradley for principal and interest in respect of

such part of the 1300*l.*, after giving credit in the account for the 108*l.* 15*s.* 6*d.* and interest, with which the plaintiff must submit to be charged as already mentioned ; and an inquiry, also, and an account of what sum or sums was or were at the date of the indenture of October, 1850, or when the plaintiff executed it, justly due from the plaintiff to the defendant Mr. Lovegrove, either for money advanced by him to the defendant C. Baker at the plaintiff's express request or otherwise ; and what, if any thing, is now due from him to the defendant Lovegrove for principal and interest in respect of such sum or sums.

And I think that, in making this inquiry and taking this account, the indenture of October, 1850, ought not to be allowed to be used as evidence. But, though I have been thus dealing with some matters of detail, I am of opinion, as I believe my learned brother to be, that the bar ought to have an opportunity of addressing the * Court, upon this or a future day, on the minutes
 * 620 of our order, if it shall be desired.

The Lord Justice TURNER, after stating the facts as above set out, said : Upon these facts, which are mainly, if not wholly, taken from the statements of the defendants themselves, two questions appear to me to arise : first, whether the mortgages of September, 1848, and October, 1850, were originally valid in equity as against the plaintiff. Secondly, if they were originally invalid against him, has there been any such confirmation or acquiescence on his part as precludes his title to relief ?

In considering the first of these questions it is, I think, necessary in the first place to inquire what was the nature and character of the transactions out of which these mortgages arose, for upon the answer to that inquiry it must, as I apprehend, depend what are the principles which ought to be applied to the determination of the case.

Transactions between parent and child may proceed upon arrangements between them for the settlement of property or of their rights in property in which they are interested. In such cases this Court regards the transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction.

On the other hand, the transaction may be one of bounty from

the child to the parent, soon after the child has attained twenty-one. In such cases this Court views the transaction with jealousy, and anxiously interposes * its protection to guard * 621 the child from the exercise of parental influence.

What, then, was the true character of the deeds of the 2d of September, 1848? The Vice-Chancellor seems to have considered them as in the nature of a family arrangement, but with great respect to his Honor's judgment I cannot so regard them. They were, as I view them, deeds contrived for the purpose of charging the debts of the father upon the estate of the son, and unless the alleged outlay by the father upon the property, or his expenditure in the maintenance and education of his son, could be made the ground of claim by the father against the son, there was not, so far as I can see, any subject of bargain between them. It would, I think, be attended with the greatest danger to permit claims of this description to be made the subject of bargain between parent and child, or to treat arrangements founded on such claims as entitled to the same favourable consideration as the Court extends to family arrangements. I am not prepared to go that length. I think these deeds can be looked at in no other light than as deeds of gift from the plaintiff to his father.

Were they, then, originally valid if viewed in that light? The plaintiff attained twenty-one on the 25th of May, 1848. On the 30th of that month he signs the undertaking which I have read. It is true that some material interval elapses before the deeds are executed, but during that interval he is fettered by the undertaking. He has no independent advice. The father's solicitor, and the father's solicitor alone, acts in the transaction. If the case had even rested here, I think it would have been sufficiently difficult to maintain these deeds, but there are considerations of still greater importance affecting their validity. They proceed upon the assumption * that the plaintiff's mother had the * 622 power of alienating her life-interest, and if she had that power her interest was by the deeds made liable for the sums secured, and would, as between the plaintiff and his mother, have been bound to contribute, if not have been primarily liable for the payment of the sums secured. It is not even pretended that the plaintiff was advised upon this question. On the contrary, the case of the defendants is, that up to this period it was assumed by all parties that the life-estate of the mother was alienable.

The case perhaps might well be disposed of upon the single ground that the alienability of the life-estate upon the faith of which the plaintiff executed these deeds, was open to doubt, and that the plaintiff was not duly advised upon that doubt ; but the question of the alienability of the life-estate has been fully argued before us, and I shall not therefore hesitate to give my opinion upon it. I concur with my learned brother in opinion that, upon the true construction of this will, the plaintiff's mother was restrained from anticipation. That question is, as I view it, purely one of intention, and if the intention be manifested by the will, it matters not, in my judgment, whether it appears upon the receipt clause or upon any other part of the instrument.

A *feme covert*, having a life-interest in property for her separate use, is indeed in the eye of this Court regarded as a *feme sole* in respect of that property, but there is this peculiar incident to her estate, that her interest in it may be modified and controlled by apt words used for that purpose. Notwithstanding what is said

by Lord COTTENHAM in *Scott v. Davies*, (a) I have not succeeded in finding any case in which it has been * held that any set form of words is required to effect this modification ; and if not, I see nothing except the intention upon which the question whether it has been effected or not can depend.

It was strongly and ably argued for the defendants, that to hold the life-estate in this case to be inalienable would be to act in opposition to the great majority of the decided cases upon the point ; and the case of *Acton v. White* (b) was very much relied on for this position, but that case proceeded on this ground, that the words which were used were construed to have been used only for the purpose of better excluding the marital right, — the same ground, it may be observed, as was referred to by Lord ELDON in *Parkes v. White*. (c) Whether this ground of decision has been sufficiently attended to in the other cases upon this point it is unnecessary now to decide ; but having looked with some care into the cases upon this subject, it seems to me to be the true ground on which these cases ought to be decided, and that the question to be considered is, whether the words used are used, as Lord ELDON has expressed it, for the purpose only of unfolding what is implied in the gift to the separate use, or for the more extended purpose

(a) 4 Myl. & Cr. 87. (b) 1 Sim. & St. 429. (c) 11 Ves. 209.

of modifying and controlling the gift. In this case the words used are: [His Lordship read them.] These words seem to me to import something more than the mere unfolding what is implied in the separate use. Some effect must be given to the words "after such payment shall have become due;" but to hold them to be merely descriptive of an incident to the estate would be to give them no effect. If the testator's purpose had been merely to define an incident to the estate, the preceding words, "and I declare, &c.," would alone have been sufficient for the purpose.

* It was argued on the part of the defendants, that these * 624 restrictive words had reference to the agent to be appointed, and not to the receipt; but this argument, if maintainable upon the letter, cannot certainly be supported upon the spirit of the will. Much reliance was also placed by the defendants upon the use of the words assigns in the early part of the disposition, but these words would have their operation in the event of the lady becoming discover, and it is of course the duty of the Court to put such a construction upon the will as will render it consistent in all its parts. If authority be wanting in support of the construction which we have put upon this will, the case of *Field v. Evans* (a) supplies that authority.

Upon the whole, looking to the age and position of this plaintiff when the deeds of September, 1848, were executed, to the undertaking of the 30th of May, which, though not alleged by the bill, is in evidence before us and cannot be disregarded as part of the case, to the want of legal advice, to the doubt upon the construction of the will, and to the construction itself, I am of opinion that, without reference to any question of confirmation, the deeds of the 2d of September, 1848, cannot be maintained. An additional sum of 200*l.*, however, was advanced by the defendant Bradley upon the mortgage of this date in his favour being executed, and it does not appear that the plaintiff did not receive some part of this sum. He cannot of course get back his estate without refunding what, if any thing, he so received. There must be an inquiry, therefore, upon this point if the defendants desire it.

We come then to the question as to the original validity * of the deed of the 24th of October, 1850. This deed is * 625

(a) 15 Sim. 375; and see *ante*, p. 609, note (d).

not disputed by the plaintiff as to so much of the 700*l.* as was due from him to the defendant Joseph Lovegrove. The question is, whether it can be maintained against the plaintiff as to so much of the 700*l.* as was due from his father. This is a transaction, not between father and son, but between solicitor and client. The deed is prepared by Mr. Joseph Lovegrove. The plaintiff had no independent advice upon it. His estate is made liable for the debt due to Mr. Lovegrove from the father. The undertaking of the 30th of May is, as I collect from the answer, recited in the deed. No advice is given as to that instrument, or the nature of the claims on which it is founded. A strong case would, I think, be required to support such a deed, even if there was nothing more to impeach it. But by this deed the mother's estate also purports to be conveyed as a security for the debt, and we are of opinion that the deed was inoperative as to her. It is true that the plaintiff must be taken to have been at this time aware that counsel had advised that the mother was restricted from alienation, but how can this deed be considered otherwise than as a representation by Mr. Lovegrove that, notwithstanding that opinion, the mother's estate could be bound. That representation proves to be unfounded; and under such circumstances and between such parties, I think that, apart from any question of confirmation, this deed cannot be supported beyond the extent to which the plaintiff has submitted to be bound by it, and any further advances which may have been made to the father upon the plaintiff's request.

There remains then the question of confirmation only. As to this part of the case, I think it immaterial to refer to any act relied on by the defendants anterior to June, 1850, for up * 626 to that time the plaintiff was in ignorance of * his true position. The facts on which the defendants have relied since the month of June, 1850, are these: the transaction with Bradley in the month of June, 1851; the plaintiff's attempt to raise further moneys; the correspondence which passed in the course of that attempt, and the application to the defendant Bradley to reduce his interest. With respect to the transaction with Bradley in June, 1851, the defendants relied, not upon the instrument which was then executed, for the plaintiff was not a party to that instrument, but upon a passage in the answer of the defendant Bradley. [His Lordship read the passage, which stated that, on the occasion of the defendant giving up part of the furniture

comprised in his security, the plaintiff's father, in the presence and hearing and with the sanction and acquiescence of the plaintiff, assured the defendant of the sufficiency of the defendant's mortgage securities.] It is to be observed, however, that what is here stated occurred in the course of a transaction between the father and Bradley, which was afterwards carried into effect by the deed of the 21st of June, 1851, and to which the plaintiff was a party; that the transaction did not directly relate to the estate in which the plaintiff was interested, and that the statement goes no further than that the plaintiff stood by and heard his father make the representations in question. It is to be observed also that the plaintiff had at this time no legal adviser, and under these circumstances I think it would be going too far to hold that what passed on this occasion amounts to such a case of confirmation or acquiescence as ought to preclude the plaintiff from relief.¹ I think that full justice will be done to the defendant Bradley in this respect by holding the plaintiff liable to make good to him the amount produced by the sale of the furniture. As to the other portions of this branch of the argument, I think it unnecessary to say more than that, in my opinion, they are wholly insufficient to preclude * the plaintiff from relief. The case of * 627 *Honner v. Morton* (a) may be usefully referred to upon this point of the case.

It was endeavoured to defeat the plaintiff's case upon the ground that the bill alleges a case of fraud, and that the fraud alleged is not proved. But this bill does not rest on the alleged case of fraud only. It alleges other equities on which the plaintiff has made out his title to relief, and in such cases I apprehend that the right to relief is not destroyed by the allegations of fraud, but the Court deals with those allegations in disposing of the costs.

(a) 3 Russ. 65.

¹ See 1 Lead. Cas. in Eq. (3d Am. ed.) [141] [142], 207, 208, 218, 219; *Stamp v. Gaby*, 2 De G., M. & G. 623, and cases in note (1).

Ex parte TAVERNER,

In the Matter of The LONDON DOCK ACT.

1855. November 9. Before the LORDS JUSTICES.

The acknowledgment of a deed by a married woman under the Fines and Recoveries Act need not be taken before enrolment of the deed.

THIS was an appeal from the decree of the Master of the Rolls, holding that, according to the true construction of the Fines and Recoveries Act 3 & 4 Will. 4, c. 74, a deed may be acknowledged by a married woman after enrolment.

The circumstances of the case are fully stated in the report of the case below, in the 20th volume of Mr. Beavan's Reports. (a)

Mr. Lloyd and *Mr. Goldsmid*, for the appellants.

Mr. R. Palmer and *Mr. Hislop Clarke*, for the respondent.

* 628 *The Lord Justice KNIGHT BRUCE said that the Act seemed susceptible of the construction put upon it by the Master of the Rolls, and that no inconvenience appeared to arise from adopting that construction.

The Lord Justice TURNER concurred.

Appeal dismissed, with costs.

(a) Page 490.

BAUD v. FARDELL.

1855. November 13, 14, 15. Before the LORDS JUSTICES.

An executrix, who was also tenant for life under a will directing the residuary estate to be sold and the proceeds invested in government or other good security, held not personally liable for not converting into consols a sum of navy 5*l.* per cents, forming part of the residuary estate.¹

THIS was an appeal from a decision of the Master of the Rolls, holding the estate of a deceased executrix liable for the non-conversion into consols of a sum of navy 5*l.* per cents, forming part of the trust estate bequeathed by the will of the original testator.

The testator, John Fardell, by his will, after making certain specific bequests, directed his executrix and executors to make sale and dispose of all the residue and remainder of his estate and effects, and to invest the money arising therefrom in government or other good security, in the names of his executrix and executors, in trust and for the intents and purposes thereafter mentioned and declared. And the testator thereby gave and bequeathed all the interest, dividends, profits, advantages, and benefit arising therefrom (after payment of all necessary costs) unto his wife, Susannah Fardell, for her life independent of and free from the control or debts of any future husband she might have; and from and after her death he gave and bequeathed all the principal moneys to arise and be made by such sale and disposition of the said residue and remainder of his estate and effects to be laid out and invested as aforesaid, and * every * 629 part thereof, unto and among the child and children of his brothers and sisters therein mentioned; and he thereby appointed his wife, Susannah Fardell, Robert Emerson, and Samuel Andrews, executrix and executors of his will.

The testator died in 1812. His will was proved by the widow and one of the executors only, the others having renounced. The widow survived the executor who proved, and she died in 1853; whereupon, the plaintiffs, who were her executors, filed the

¹ See *Lewin Trusts* (5th Eng. ed.), 270, 271; *Bate v. Hooper*, 5 De G., M. & G. 338, and cases in notes; *Howe v. Earl of Dartmouth*, 7 Ves. (Sumner's ed.) 137 and notes, 151 in note; 3 Lead. Cas. in Eq. (3d Am. ed.), 474.

claim in the present suit for the administration of the testator's estate.

By the chief clerk's certificate it appeared that a part of the testator's estate consisted of navy 5*l.* per cent annuities, part of which was sold for payment of debts, and the residue, amounting to 1400*l.* of the above-mentioned stock, remained unsold, and had become, under the provisions of the Act of Parliament passed for that purpose, converted into 1470*l.* new 3*l.* per cent annuities.

By the order on further consideration it was declared that the estate of Susannah Fardell, the widow of the testator, was liable and bound to make good to the residuary personal estate of the testator the amount in money by which the capital of the residuary personal estate of the testator had been diminished, by reason of the 1400*l.* navy 5*l.* per cents not having been converted into 3*l.* per cent consols, at the time in the chief clerk's certificate mentioned, together with the amount in money by which the income of the residuary personal estate had, since the death of Susannah Fardell, the tenant for life, been diminished by such non-con-

* 630 version ; and it appearing by the certificate that the * 1400*l.* navy 5*l.* per cents would, at the time therein mentioned, have purchased 2111*l.* 18*s.* 3*l.* per cent consols, and the plaintiffs, as executors of Susannah Fardell, admitting assets, it was ordered that the 1470*l.* new 3*l.* per cent annuities which had been transferred into Court should be sold, and that the money arising from the sale should be laid out in the purchase of bank 3*l.* per cent annuities, and that the plaintiffs, as such executors, they admitting assets for that purpose as aforesaid, should, within one month after the purchase of the said bank annuities, or within one month after service of the order, transfer into the name of the accountant-general, in trust in the cause, such a sum of bank 3*l.* per cent annuities as would, with the bank 3*l.* per cent annuities purchased as aforesaid, make up the sum of 2111*l.* 18*s.* like annuities.

The plaintiffs appealed from this decree.

Mr. Chandless and *Mr. Villiers*, in support of the appeal.— They submitted, that although the 3*l.* per cents were the fund in which the Court directed investments to be made, it had never been decided that under a trust to invest in government securities trustees or executors were bound to invest in that fund only, and

much less that they were bound to disturb an existing investment in other government securities.

They referred to *Robinson v. Robinson*, (a) *Marsh v. Hunter*, (b) *Trafford v. Boehm*, (c) *Howe v. Earl of Dartmouth*, (d) *Cranch v. Cranch*, (e) *Angell v. Dawson*, (g) *Raby v. Ridehalgh*. (h) * 631

Mr. Roundell Palmer and *Mr. Batten*, for the respondent. — Although there may be no case exactly in point, the principle of the decision of the Master of the Rolls is supported by many authorities. *Howe v. Lord Dartmouth*, (i) *Byrchall v. Bradford*, (k) *Holland v. Hughes*, (l) *Hockley v. Bantock*. (m) If the Court should hold that there has been in this case a due execution of the trust, an executor will always be at liberty to invest in that government security which bears the highest rate of interest, although such a course may be to the prejudice of the person entitled in remainder.

[THE LORD JUSTICE TURNER. — If the rule be as you insist it is, how is the practice of the Court to be accounted for, according to which sums of other stock than 3l. per cent are constantly carried to the credit of the accountant-general, without realization and reinvestment?]]

The question has never been raised in such cases.

They referred to *Hancom v. Allen*, (n) *Norbury v. Norbury*, (o) *Dimes v. Scott*, (p) *Ex parte Chaplin*, (q) *Raby v. Ridehalgh*, (h) *Lewin on Trustees*. (r)

Mr. Hetherington and *Mr. C. Locock Webb*, for other parties.

* *Mr. Chandless*, in reply.

* 632

(a) 1 De G., M. & G. 247.

(b) 6 Madd. 295.

(c) 3 Atk. 440.

(d) 7 Ves. 137.

(e) 7 Ves. 141, n.

(g) 3 Y. & C. 308.

(h) 7 De G., M. & G. 104.

(i) 7 Ves. 137; see p. 151.

(k) 6 Mad. 235.

(l) 16 Ves. 111.

(m) 1 Russ. 141.

(n) 2 Dick. 499.

(o) 4 Mad. 191.

(p) 4 Russ. 195.

(q) 3 Y. & C. 397.

(r) Page 351 (3d ed.).

THE LORD JUSTICE KNIGHT BRUCE. — It appears to me, that, according to the language of the will before us, it was not necessarily the duty of the executrix (though interested as she was under it) to sell the navy 5*l.* per cent stock belonging to the testator, and that, having (so far as I can judge from the materials in the cause) conducted herself with good faith, nor entertained any dishonest or improper intention, she did not commit a breach of trust by retaining the stock and receiving the dividends upon it during the considerable time (more, I think, than thirty years) that she survived the testator.

How the case would have stood if the stock had, at his death, been 3*l.* per cent stock, and she had sold it, and with the produce bought 5*l.* per cent stock, I give no opinion. But it is impossible not to see that one kind of stock was as much a government security as the other, and (unless that the government was more likely to exercise its power of redeeming or repurchasing one than the other) as permanent.

If, with reference to *Howe v. Lord Dartmouth*, or otherwise, I had thought that Lord ELDON would have taken a view of this case different from mine, I should probably, or certainly, have followed his opinion; but I do not think so.

THE LORD JUSTICE TURNER. — This is a case of the first impression. I have never met with an instance in which, where trustees have had a discretion expressly reposed in them as to the nature of the investments, the Court has charged them personally
 * 633 * for not having invested in the 3*l.* per cents. It has been urged, that the case is affected by what Lord ELDON said in *Howe v. Lord Dartmouth*, but in that case there was no express trust for investment; so that when Lord ELDON said that what the Court would do it expected from trustees, he spoke with reference to the circumstances of the case before him, and meant, that, as the Court would have invested in the 3*l.* per cents, trustees to whom no discretionary power was given must do the same. The Court has adopted the 3*l.* per cents as the most fair and reasonable fund for investment, with a view to the benefit of all parties. This decree, however, goes the length of saying, in effect, that if trustees adopt a different fund, the Court, in the absence of any evidence of unfairness or unreasonableness, will infer that the investment is unfair and unreasonable.

I have attended to all the authorities cited, and none of them appear to be sufficient to support this decree. In *Holland v. Hughes* there was no express trust to invest, and therefore no discretion. In *Ex parte Chaplin* the statute there in question contemplated a permanent, not a fluctuating investment, and therefore did not authorize an investment in exchequer bills. In *Dimes v. Scott* the trust was to invest in government or real securities, which could not be held to apply to Indian stock, in which the investment had there been made.

It is also to be observed, that the Court, in administering a trust, never sanctions an investment on mortgage except under very special circumstances, though such an investment may be authorized by the instrument creating the trust. (a) But no one ever thought, that if, in such a case, a trustee in his discretion invested on * mortgage, he was to be held liable as for * 634 a breach of trust, because the Court itself would not have made such an investment.¹

It has been urged, that a reversal of this decree will hold out a temptation to trustees to invest in funds bearing a high rate of interest with a view to the benefit of the tenant for life only, and to the prejudice of those entitled in remainder. The answer to this is, that if trustees choose to act in that way, the Court will know how to deal with the matter. Such a case has no analogy to one in which the trustees have exercised a fair and reasonable discretion.

COLLINSON v. LISTER.

1855. November 25, 26. December 3. Before the LORDS JUSTICES.

If a lender of money to an executor has, at the time of the loan and before parting with the money, notice that the executor in borrowing commits a breach of trust and intends to misapply the money, he acquires no better title against the estate than the executor himself.*

(a) See *Ex parte Franklyn*, 1 De G. & Sm. 528.

¹ See *Raby v. Ridehalgh*, *ante*, 104, and cases in n. (2); *Robinson v. Robinson*, 1 De G., M. & G. 247, 263, in notes.

* See *Hill Trustees* (3d Am. ed.), 249, 250, and cases in notes; 1 Story Eq. Jur. § 400 b.

Where a local agent of a banking company in that character advances money of the company by way of loan, and the borrower, to the agent's knowledge, is obtaining the money for the sole purpose of misapplying it, the company acquires no better title than the agent would have had had the case been his own, or than the borrower.

An executor borrowed money from a banking company of which he was the local agent, for the purpose of making a further advance to a mortgagor of a ship, on the security of which the testatrix had lent money, on the pretence that such further advance was made to pay off a prior charge, but really to assist the mortgagor, and the security proved ultimately wholly insufficient: *Held*, that the company had no claim upon the testatrix's assets, and that a mortgage of the ship made by the executor to the company to secure their advance was invalid.¹

THIS was an appeal from the decision of the Master of the Rolls, reported in the 20th volume of Mr. Beavan's Reports, (a) where the facts are fully stated. The following is a short outline of them.

The appellant Lister was the executor of a Mrs. Hardisty, who had advanced 1500*l.* to a Mr. Fletcher on a mortgage of a * 635 steam vessel called the Toward * Castle. Some time after the advance was made, the defendant Lister, who was then acting as the testatrix's agent, permitted the machinery to be removed from that vessel to another, called the Engineer, which was, in consideration of such permission, agreed to be mortgaged to her. After her decease, the defendant Lister, who was also the local agent of a branch of the York City and County Bank, advanced out of the moneys of the bank sums amounting to 1620*l.* to Mr. Fletcher, assuming to borrow the money as executor of Mrs. Hardisty for the ostensible purpose of enabling Mr. Fletcher to pay off or settle a paramount charge on the Engineer for repairs, and thereby improving the testatrix's security. In the opinion, however, of their Lordships on the evidence, this was not a *bond fide* transaction, but was intended merely to serve Mr. Fletcher. On the directors of the banking company advertent to the loan,

(a) Page 356.

¹ See *Lewin Trusts* (5th Eng. ed.), 855, 356, 456; *Sugden V. & P.* (14th Eng. ed.) 668; 3 Lead. Cas. in Eq. (3d Am. ed.) 451, 475; *Mulligan v. Wallace*, 3 Rich. Eq. 111; *Petrie v. Clark*, 11 Serg. & R. 388; *Field v. Schieffelin*, 7 John. Ch. 155; *Williamson v. Morton*, 2 Md. Ch. 94; *Garrard v. R.R. Co.*, 29 Penn. St. 154; *Dodson v. Simpson*, 2 Rand. 294; *Williamson v. Branch Bank*, 7 Ala. 906; *Ashton v. Atlantic Bank*, 3 Allen, 217; *Miller v. Williamson*, 2 Md. Ch. 94; *Perry Trusts*, § 810.

they required security for it; and Lister, as executor, mortgaged the Engineer to them, with a power of sale. Under this power the company had sold the vessel for 1150*l.*, and received the purchase-money.

The plaintiffs, who were residuary legatees under Mrs. Hardisty's will, then instituted the present suit, seeking administration accounts against Lister, and praying that the company might account for all moneys received by them on account of the sale of the vessel.

The Master of the Rolls directed the bank to pay into Court the money in their hands arising from the sale of the ship, and directed an account against the defendant Lister, in which he was disallowed the sums borrowed from the bank.

From this decree the defendants appealed.

Mr. Roupell and *Mr. Amphlett*, for the plaintiff.

* *Mr. Follett* and *Mr. Robson*, for the appellant Lister. * 636

Mr. R. Palmer and *Mr. Hobhouse*, for the banking company.

The arguments were similar to those addressed to the Court below; and in addition to the authorities there cited, *Duncan v. Tindall*, (a) *Pennell v. Deffell*, (b) were referred to.

Judgment reserved.

December 8.

THE LORD JUSTICE KNIGHT BRUCE. — This appeal is from the decree in a cause exhibiting too much unscrupulous conduct to be observed without regret and something more. The decree — at once by relieving the small estate of Mrs. Hardisty, the testatrix in the cause, from two sums of 300*l.* and 1320*l.*, sought to be charged against it as alleged to have been after her death applied for its benefit by her executor and obtained for the purpose by him from the funds of a banking company in Yorkshire, and by restoring also to it a sum of 1150*l.* abstracted from it by the executor and the company — has given that estate a chance of escape from annihilation to which the defendants, consisting of the executor and certain ministers of the banking company, who here represent that establishment, object.

The first question is, whether as to these three sums the com-

(a) 13 C. B. 258.

(b) 4 De G., M. & G. 372.

[498]

pany have a better right or firmer standing ground than their dismissed officer and present ally Mr. Francis Lister, the executor, possesses,—a question, I think, to be answered certainly in the negative. There have been instances, no doubt, in which a dishonest executor, by borrowing money in that character, * 637 has * been able to make the lender effectually a creditor on the estate of the deceased. But if at the time of a loan to an executor as executor, and before parting with the money, the lender has notice that the borrower in borrowing acts improperly, commits a breach of trust, and intends to misapply the money, the lender acquires no better title against the estate than the executor himself has, and must stand or fall with him. This rests not only on the plainest principles of justice, but on the direct authority of Lord ELDON, nor on his great authority alone.

And if a banking company has what is called a branch bank managed or superintended by a local agent who in that character advances money of the banking company by way of loan, knowing at the time facts which render the loan an improper transaction, and would prevent the agent from sustaining it were the transaction and the money his own,—as in the instance of a trustee borrowing money in that character, who by the very act of so borrowing commits a breach of trust, having sought and obtained the money for the sole purpose of misapplying it, and the circumstances being all known at the time to the agent lending,—I apprehend it to be clear, that the banking company acquire no better title than the agent would have done had the case been his own, or than the trustee.

But here, if the York City and County Bank were lenders to Mrs. Hardisty's executor, the executor borrowing, and their agent lending, was one and the same person. Mr. Lister helped himself first, and then immediately his confederate, Mr. Fletcher, to the 300*l.* and the 1320*l.* This was done before the month of June, 1851, nor has the security under which the banking * 638 company claim the 1150*l.*, a security given not before * January, 1852, any other foundation than those advances of 300*l.* and 1320*l.* made so many months previously. They are the 1620*l.* mentioned in the security, and by them are intended the two sums mentioned also in that instrument, and in the deed bearing the date of the preceding April, which it recites. For all the purposes of this suit, therefore, so far as the 300*l.*, the 1320*l.*,

and the 1150*l.* are concerned, Mr. Lister is the banking company, and the banking company are Mr. Lister.

It then becomes material to determine what were the nature and character of the acts and conduct of Mr. Lister with respect to the removal of the machinery of the ship Toward Castle, which, with the machinery, was made a security to the testatrix by the deed of March, 1850, for the money (1500*l.* or not much less) that mainly I am convinced, through his instrumentality, she had been led into lending with Mr. Fletcher; and with respect also to the ship Engineer, and especially to the heavy and rash and almost unaccountable expenditure upon that vessel appearing to have taken place in one or both of the years 1850 and 1851.

And I may, in the first place, notice the very slight regard to correctness of statement which some at least of the documents in evidence, that were professionally prepared, exhibit; a bad habit, to say the least; nor do I confine the remark to the simulated purchase from Mr. Lister by Mr. Pennell, who seems to have been another of the bank auxiliaries.

I must next say that, after having considered, not only all the documents, but all the undisputed facts before the Court, the manner in which they respectively affect Mr. Lister, and the degree of weight properly attributable to * the state- * 639 ments on oath made by him as a defendant and as a witness, the circumstance that Mrs. Hardisty was an executing party to the deed of March, 1850, the security on the Toward Castle, though not to the deed of October, 1850, the security on the Orion, the whole of the evidence, and the observation that Mr. England says no more than he does say, I am unable to represent myself as persuaded, nor can I think the defendants entitled to ask the Court to believe, that Mrs. Hardisty agreed or consented to relinquish her security on the Toward Castle, or on the machinery on board of that vessel, or agreed or consented to the removal of the machinery from the vessel, or agreed or consented to accept a security on the Orion and the Engineer, or either of those ships.

But it is clear that the removal, and the works preparatory to the removal of the machinery from the Toward Castle, were with the knowledge and consent of Mr. Lister, who professed to act, in that respect at least, as the testatrix's agent in her lifetime. And it

must from the materials before us be also taken that he was at the time of her death aware of the contents of her will, and immediately afterwards accepted the executorship, with full knowledge at the time of all circumstances then existing which it was material for her estate that he should know concerning the ships and machinery in question. There is not, however, I think, any judicial ground for believing that at the time of her death, or until a time subsequent to May, 1851, Mr. Fletcher was insolvent or out of England, if indeed he has been at any time insolvent or out of England.

These things being so, it must, in my opinion, be considered as clear that it was the duty of Mr. Lister, with all practicable * 640 despatch after the death of Mrs. Hardisty, * to prove her will, and demand from Mr. Fletcher payment of the 1500*l.* secured on the Toward Castle, or, if the whole of that sum was not, as much of it (more than four-fifths certainly) as was, due to her estate, and to proceed and take active measures against him personally for enforcing the payment if refused or delayed.

Mr. Lister did no such thing, and on the contrary took the plainly unjustifiable line which ended in the security bearing the date of April, 1851, and affecting the ship Engineer. He so made himself of course personally liable to Mrs. Hardisty's estate, if not for the whole 1500*l.*, at least for the portion (more, as I have said, than four-fifths of that sum), belonging to her estate; and this, whether the legal or equitable effect of the deed just mentioned was to give time to Mr. Fletcher or was not. And her estate accordingly, and therefore the plaintiffs, upon the security being taken, became, of course in aid of Mr. Lister's liability, and in addition to that liability, entitled to a lien and charge on the ship Engineer, as well as the machinery, for what he had so become personally liable to pay, a lien and charge unquestionably preferable to any rights of the banking company under their security of January, 1852, and as unquestionably preferable to any claim, whether on the part of Mr. Lister or otherwise, in respect of repairs or works of any kind to or upon that or any other vessel or any machinery. The lien of the ship-builders was satisfied and at an end in April or May, 1851, when they parted with the Engineer and her machinery, and suffered Mr. Fletcher to take (as he then did) possession of both with Mr. Lister's assent. That lien was not intended to be kept alive. It was ex-

tinguished. If it could have been transferred, it never was so. If it could have been revived, it never was so. The notion of bringing any portion of the sums which besides the 1500*l.* were mentioned * in the security of January, 1852, into a * 641 position of superiority or equality to the 1500*l.* (or to the part of that sum belonging to Mrs. Hardisty) seems to me, I confess, absurd; it being manifest that there was a total absence of right in the executor to lay out any money belonging to the testatrix's estate in repairing, enlarging, or improving the ship Engineer, or in removing the machinery, or upon the machinery.

If Mr. Lister was at any time a mortgagee in possession, he was certainly not so until a time subsequent to all the expenditure represented by the 1620*l.*, composed of the 300*l.* added to the 1320*l.* comprised in the 1600*l.*; nor, in my judgment, has he the apology or excuse of having intended to benefit the testatrix's estate, if apology or excuse it could be, for the evidence satisfies me that in these transactions he thought of nothing but his own personal and private advantage, or the advantage of his associate, Mr. Fletcher, as connected with his own.

It is plain that, as between Mr. Lister and the plaintiffs, the 1150*l.* received on the sale of the Engineer was the money of the plaintiffs, or of the estate of Mrs. Hardisty, and not less was it so as between them and the banking company. The fraud on that establishment committed by Mr. Lister could of course give it no right to acquire indemnity by assisting him to commit a fraud on the plaintiffs, whose trustee the banking company in effect knew him to be. A confidential servant robs his master, and being found out is of course conscience-stricken. He desires accordingly to make restitution or render an equivalent, which the master is willing to accept, but the servant, not being able to procure this without robbing another friend, does so, and offers the produce to the master, who accepts it knowing * the * 642 manner of the acquisition, and then insists on holding it against the true owner. That and nothing less is substantially the present case.

The defendants have not been charged as upon the reality of the part of purchaser written in a redundancy of invention for Mr. Pennell, and played so well that they had a solicitor's attestation to the receipt for the fictitious purchase-money, though that a solicitor should have thought it right to participate in such a

measure I am, I confess, surprised. If the defendants had been so charged, I am not sure that I should have dissented, but a milder sentence was asked and given.

The registry law was mentioned in the argument. It has nothing to do with the matter. No misconduct, no acquiescence, has been established against the plaintiffs, to whom, as to costs and otherwise, the decree, in my opinion, does no more than justice.

The united appellants will pay the costs of their more than unfounded appeal, more at least than unfounded so far as they complain. For there must be made to the decree the addition of charging them with interest on the 1150*l.* received by the banking company from the time when it was so received. At the present stage of the cause probably nothing needs be said respecting Mr. England's bills of costs, or the bequests made by the will to an executor whom, for the interests and credit of society, it is to be hoped that very few resemble. These points will doubtless hereafter receive such attention as may be necessary.

THE LORD JUSTICE TURNER. — I am also of opinion that this appeal must be dismissed. There is no pretence for the * 643 banking company standing * in any better position than Lister, the executor. They have taken an assignment of securities which upon the face of them appear to belong, and which they must have known to belong, to the estate of the testatrix, and have taken the assignment for securing an antecedent debt due to them from Lister, and neither upon principle nor upon authority can they claim to have any better right than Lister himself had. The case, therefore, must be decided as it stands between the estate and Lister.

The mortgage, on which the question arises, is for securing three sums of 1300*l.*, 320*l.*, and, nominally, 1300*l.*, in effect 1320*l.* The first of these sums, the 1300*l.*, was undoubtedly advanced by the testatrix. The other sums, the 300*l.* and the 1320*l.*, were advanced by Lister, the executor. The question, as I view it, is, whether Lister is entitled to set up the advances made by him against the advance made by the testatrix. I am of opinion that he is not.

In order to give him that right it was incumbent on him at least to show that the advances were necessary to be made, and were

made *bond fide* with a view to the benefit of the estate, and in my opinion he has wholly failed to prove both the necessity and the *bona fides* of the advances. Lister, as he himself states, was very intimate with Fletcher's family; he was under obligations to Fletcher's father. It was Fletcher's duty to have completed the repairs of the vessel, as appears by the instrument of the 18th of March, 1851. No proof is given that he was ever applied to for the purpose, or that he had not the means of doing so. In this state of circumstances I feel bound to conclude that these advances were made for the accommodation of Fletcher, and not for the protection of the testatrix's estate, and there is evidence which seems to me directly to support that * conclusion. * 644 The answer of the defendant states that it was his proposal to advance 700*l.*, which in March, 1851, it was supposed would be sufficient to complete the vessel, and on the 15th of March, 1851, the defendant writes to Mr. England as follows: "It is now decided that I, as Mrs. Hardisty's executor, shall advance another 1000*l.* to Mr. Thomas Fletcher, and take a mortgage on the Engineer for 2500*l.* I think it probable that the family will relieve me of it rather than allow me to sell, which of course I must do in the long run to wind up her affairs. So that you will be good enough to prepare a mortgage to me for 2500*l.* The ship is to be ready in about a fortnight. In the mean time Mr. Fletcher wants money to pay on account; will it be sufficient to take a memorandum, or ought I not to have a promissory note?"

It was argued for the defendants that the bill rests the case on the arrangement for the transfer of the engines from the Toward Castle to the Engineer having been made without the authority of the testatrix, and that this was disproved; that the testatrix's security was of no value at the time of her death, and that the effect of the decree is to give her estate the benefit of an improvement which has wholly resulted from the expenditure of the defendants; and that an inquiry should have been directed whether there was any loss to the estate from what occurred after the testatrix's death. But there is quite sufficient allegation in this bill to open the question whether the advances by Lister were properly made; and the defendant's argument as to the improved value, and in support of his case as to the inquiry suggested, passes by the fact, which is also alleged by the bill, that the advances in

question were made to Fletcher, who was himself bound to complete the repairs.

* 645 The defendants attempted also to make out by the * evidence a case which is not even alleged by the answers; viz., that the plaintiffs stood by and saw the repairs done, and that they authorized the payments by the defendant Lister. But the fact of the plaintiffs having seen the repairs done can amount to nothing, as it was Fletcher's duty to do them. And without entering into the conflict of the evidence as to the plaintiffs having authorized the payments, it is sufficient to say that it is not even alleged, and much less proved, that the circumstances under which the advances were made were ever communicated to them.

A point was also attempted to be raised upon the Ship Registry Acts, but I have not been able to see how any such point can arise, for whether the title to the ship, first in Pennell and afterwards in Ibbetson, could or could not be affected by the trusts of the mortgage-deed of April, 1851, it is clear that whatever was received from Pennell or Ibbetson must be subject to those trusts, and the question we have to consider is which of the conflicting titles upon this record ought under those trusts to be preferred.

The only remaining point urged on the part of the defendants was the claim of the bank to an apportionment in respect of the 165*l.* 18*s.* advanced by them for the purpose of making up the 1500*l.* lent to Fletcher. This claim cannot, I think, be maintained, for the sum in question was not lent by the bank upon the mortgage, but advanced to the testatrix for the purpose of enabling her to make up the mortgage money. *Mr. Hobhouse* has this morning referred us to the case of *Pennell v. Deffell*, (a) and has argued

from that case that the bank have the right to follow the * 646 moneys which were advanced * by them to Lister into the proceeds of the ship. But, in the first place, the banking company in this case treat the transaction as a loan by them to Lister, and they take the assignment of the securities for securing the amount alleged to be money advanced, but clearly being the money which was antecedently due from them to Lister, and no such question therefore can arise.

In my opinion, therefore, this decree is right as far as it goes,

(a) 4 De G., M. & G. 372.

I think it should have gone further. I agree with my learned brother that the bank ought to be charged with interest on the moneys received by them. The moneys which they have received are trust moneys improperly retained by them, and which must have produced interest in their hands. The interest should be at 5 per cent. In this respect I think the decree must be amended, of course the appellants must pay the costs.

* HOPE v. THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF GLOUCESTER. * 647

1855. November 7, 8. December 6. Before the LORDS JUSTICES.

By an indenture dated in 1529, conveying lands to a municipal corporation for charitable purposes, the corporation covenanted, that when a term of ninety-nine years in a farm, part of the hereditaments granted, should expire, if any of the heirs of the body of a person named in the grant being of consanguinity and kindred of the grantor should come, claim, and make lawful request to the mayor and burgesses for the time being to have a new grant and lease to him or her to be made within one year next after it should fortune the same farm to be void and come into the hands of the said mayor and burgesses, that then and as often as any such chance should fall, the said mayor and burgesses for the time being, upon such request to them so made, should make or cause to be made a new lease and grant of the said farm to such heir so making request, for thirty-one years and no more nor less, reserving to them and their successors twenty marks of annual rent during the said term: *Held*, that the covenant was invalid, as creating a perpetuity.¹

THIS was the appeal of the plaintiff William Hope from the dismissal of his bill by Vice-Chancellor STUART.

The plaintiff by his bill alleged himself to be the heir of the body of Margaret Woodward, and also the personal representative of Humphrey Holman, who was the eldest son and heir of the body of Margaret at the time of her death; and he claimed to have a lease granted to him of a farm called Poddesmead, now producing an annual rent of between 400*l.* and 500*l.*, for a term of thirty-one years at a rent of 13*l.* 6*s.* 8*d.*, under a covenant con-

¹ See *Lewin Trusts* (5th Eng. ed.), 409, 410; 1 *Jarman Wills* (3d Eng. ed.), 226 *et seq.*; (4th Am. ed.) 258; *Tench v. Cheese*, 6 De G., M. & G. 453, and cases in note; *Monypenny v. Dering*, 2 De G., M. & G. 145 and notes.

tained in a deed dated the 11th of January, 1529; and he asked also for relief consequent on his title to the lease.

The title was deduced in the following manner: On the 18th May, 1528, John Cooke, one of the aldermen of the then town of Gloucester, being possessed of considerable personal estate, duly made his last will and testament in writing in the Latin tongue, whereby he declared that his wife Joan, with such goods, money,

household, and plate as he had left to her disposition,
 * 648 * should, in as short and speedful time as she conveniently might after his decease, purchase manors, lands and tenements, annuities or other hereditaments in fee-simple to the clear yearly value of 20*l.* above all charges, and of the same lands and tenements, annuities or other hereditaments so bought and purchased in short time thereafter should enfeoff or make an estate thereof to certain persons and their heirs to such charitable purposes as therein mentioned: the residue of all his goods, his debts first paid, he charged his wife, whom he made sole executrix, to dispose of for the wealth of his soul, and was at her discretion; and if she thereafter took a husband, the testator charged her to dispose the one-half part of such goods as he left to her disposition, after his debts and legacies paid, for the wealth of his soul as therein mentioned.

King Henry VIII., by his letters-patent under the Great Seal, dated the 6th of September, 1539, in consideration of 266*l.* 6*s.* 8*d.*, paid into the treasury by Joan Cooke, granted unto the said Joan Cooke the site of the manor of Poddesmead, or the grange of Poddesmead within the parish of Hempstead, in the county of the town of Gloucester, with the appurtenances, and various closes of pasture, meadow and arable land, containing in the whole 167½ acres, and pasture for thirty-one oxen in the common field therein mentioned; and all the tithes of the same premises come to the King's hands by the dissolution of the abbey of Lanthony, to hold the same unto the said Joan Cooke, her heirs and assigns for ever, to be held of the said King and his successors, by the service of the tenth part of a knight's fee and under the annual rent of 30*s.*

By an indenture of lease, dated the 10th of November, 1539,
 * 649 and made between the said Joan Cooke of the one * part and John Partridge of Poddesmead aforesaid, gentleman, and Ellen his wife, John, Arthur, and Ewett, children of the said Joan, Margaret Woodward, Ann Woodward, Margery Woodward,

and Elizabeth Woodward, daughters of the said Ellen, of the other part, the said Joan Cooke demised the said site of the manor of Poddesmead, and all the said lands, common for thirty-one oxen, tithes and hereditaments which she had lately purchased of the King unto the said John and Ellen from Michaelmas then last, for the term of ninety-nine years then next ensuing, with a declaration that, upon the death of the said John Partridge and Ellen his wife, the demised premises should come successively to the said John, Arthur, and Ewett Cooke, Margaret Woodward, Ann Woodward, Margery Woodward, and Elizabeth Woodward, one after another, if they should be then living, yielding yearly unto the said Joan Cooke, her heirs and assigns, 13*l.* 6*s.* 8*d.* of lawful money, at Lady-day and Michaelmas, by equal portions, and subject to the above-mentioned rent of 30*s.* payable to the King and his successors, and to a power of re-entry if the said rents should be unpaid for one month after they become due, and no distress found, and subject also to the performance of the covenants therein contained.

By an indenture dated the 11th January, in the 31st Henry VIII., 1539, made between the said Joan Cooke of the first part, the mayor and burgesses of the town of Gloucester of the second part, and the bailiffs and citizens of the city of Worcester of the third part, after referring to the will of the said Joan Cooke and certain letters-patent of license to the said mayor and burgesses to take lands to them and their successors for ever, notwithstanding the Statute of Mortmain, it was witnessed that the said Joan Cooke, for the sure performing, maintaining, * and * 650 continual fulfilling of the premises for evermore, as well according to the intent or effect of the will of the said Joan Cooke, and also according to the tenure and effect of the said letters-patent of license, granted and confirmed unto the said mayor and burgesses and their successors for ever, all those her manors, messuages, lands, tenements, rents, reversions, and services, with their appurtenances, lying and being in Poddesmead, Hempstead, Elmore, Radgworth, and Bentham, within the county of the town of Gloucester, and other hereditaments, which with the appurtenances, exceeded not the value of 40 marks (26*l.* 13*s.* 4*d.*), to hold unto the said mayor and burgesses and their successors for ever, for which gift the said mayor and burgesses did covenant, promise, and grant that the said Joan Cooke should receive the rents and profits of the premises to her own use during her life, and that

after her death, out of the rents of the said manor or farm of Poddesmead and other the lands and tenements, parcel of the premises in Poddesmead, Hempstead, and Elmore aforesaid, they should pay to a schoolmaster 10*l.* if a priest, and 9*l.* if a layman, for the school therein mentioned, and with the yearly revenues of other the premises make the yearly payments therein mentioned, and with the yearly rent of all the premises, and with part of the yearly surplus of the said manor and other the premises, to the yearly value of 5*l.* in the whole, should repair a bridge and causeway therein mentioned; and further, the said mayor and burgesses did thereby covenant for such survey of the said school-houses as therein mentioned, they to have for their pains in such survey such sums as therein mentioned. The deed then proceeded as follows: "And further, it is condescended, covenanted, and fully agreed between the said parties and the said mayor and burgesses,

for them and their successors, covenanting, promising, and * 651 granting by * these presents to and with the said Dame Joan and her executors, that at all times hereafter when it shall fortune them to make any demise or grant of any of the said manors or other the premises or any part thereof to any person or persons, that they shall in no wise take no more fine or reward for any such lease or grant thereof so to be made for years, that is, to wit, only for thirty and one years, and not above nor under, but so much money as one year's rent of the land so to be leased or granted shall amount or extend unto, and no more, besides the usual fees for their common seal and writing thereof; nor also they in no wise shall improve nor increase the rents thereof upon any such lease or grant, but only upon a great and urgent cause thereupon pressing and openly known; and further covenanting and granting that whensoever it shall fortune at any time or times hereafter, that the state or term of years which the said John Partridge, Ellen his wife, and their children, now have by indenture of and in the said farm of Poddesmead shall be ended or determined, or otherwise to become void by any manner of means than if any one of the heirs of the body of Margaret, one of the daughters of the said Ellen, or in default of them, any of the heirs of the body of the other daughters of the said Ellen named in the said indenture, being of consanguinity and kindred of the said Dame Joan Cooke, do come, claim, and make lawful request to the mayor and burgesses of the said town for the time being to have a new

grant and lease of the said premises, with the appurtenances, to him or her to be made, within one year next after it shall fortune the same farm to be void, and come into the hands of the said mayor and burgesses, at all times hereafter, that then and so often as any such chance shall fall, the said mayor and burgesses for the time being, upon such request to them so made, shall make or cause to be made a new lease and grant of the said farm

* of Poddesmead, with the appurtenances, after the tenor and * 652 effect of the said John Partridge's lease, to such heir and cousin as is aforesaid so making request, for thirty-one years and no more nor less, reserving to them and their successors twenty marks of annual rent during the said term; and the same lessee to be bound to all reparations and payment of all rents and tenths going out of the premises, and the same lessee to pay for every such lease so obtained twenty marks to the said mayor and burgesses for the time being, in the name of a fine, and no more, and so to continue from time to time for evermore if any such request within the time aforesaid shall happen to be made as is aforesaid, at the end of every lease and estate which hereafter shall so be made.

The lease of the 10th of November, 1539, had, it appeared, in the year 1633, become vested in Henry Holman, the eldest son of Humphrey Holman, who surrendered it to the corporation of Gloucester, and thereupon the corporation demised the farm to Henry Holman for thirty-one years, at the rent of 13*l.* 6*s.* 8*d.* From this time the corporation continued from time to time, upon the determination of the existing leases, to grant new leases to the heir of the body of Margaret Woodward for the time being for the same term of thirty-one years, and at the same rent of 13*l.* 6*s.* 8*d.* down to the year 1815, when the last of these leases was granted for a term of thirty-one years commencing from Michaelmas, 1814.

One of the leases thus granted by the corporation became the subject of a suit in this Court. It appeared, that, in the year 1690, a lease of the farm was granted by the corporation to Eliza Hoskins and George Evans and Sarah his wife, Eliza and Sarah being the then co-heirs of Margaret Woodward. That some time previous * to 1714 the interests of Eliza and * 653 Sarah in the lease had passed as to Eliza's share to Holman Hoskins her son, and as to Sarah's share to George Evans her

son. That Holman Hoskins had fraudulently obtained from George Evans an assignment dated the 20th of July, 1709, of his interest in the lease of 1690, and had afterwards surrendered that lease and obtained from the corporation a new lease dated the 12th of January, 1714, to himself alone for the term of thirty-one years at the rent of 13*l.* 6*s.* 8*d.*, and that, under these circumstances, George Evans filed a bill in this Court against the corporation and the executors of Holman Hoskins and Eliza Hoskins his infant child, who was entitled under his will, and against the corporation, to set aside the assignment which had been made by him, and to have a new lease of the premises granted to him and the defendant Eliza Hoskins, to commence from the expiration of the former lease of 1690. The corporation, by their answer in this suit, admitted, that the plaintiff might have had a tenant right to one moiety of the premises had it not been for the conveyance from him to Holman Hoskins, and said they were ready to act as the Court should direct. The other defendants, of course, maintained the validity of the assignment.

The Court by its decree dated the 27th of January, 1723, after setting aside the assignment, and giving consequential relief on that part of the case, proceeded as follows: "And it is further ordered and decreed, that the defendants, the corporation of Gloucester, do grant a new lease of the said premises for the equal benefit of the plaintiff and the defendant Eliza Hoskins, the daughter of the said Holman Hoskins, for the term of thirty-one years, to commence from the expiration of the lease granted in 1690, with the same covenants as were contained in the said

* 654 Partridge's lease, and according to * the terms mentioned in the said deed of the 31st of King Henry VIII., but the said defendants, the corporation of Gloucester, are not to have any fine on making such new lease, in regard they were paid a fine on making the last lease to the said Holman Hoskins, which said lease to Holman Hoskins is to be delivered up to be cancelled."

Further disputes appeared to have afterwards arisen upon the subject of this lease, in consequence of a will made by Eliza Hoskins, the infant, during her minority, by which she appointed a Mrs. Russell to be her executrix and residuary legatee; but ultimately, by a decree dated the 1st of May, 1731, upon a bill filed by Mrs. Russell and her husband, it was ordered that Haynes,

one of the defendants, should pay unto the plaintiffs 1579*l.* 8*s.* 5*d.*, appearing to be in his hands, retaining thereout a legacy of his own of 300*l.*, and also being allowed thereout two legacies of 200*l.* each, devised to two other defendants named Lyssons and Berrow, and that the defendant Haynes should deliver up to the defendants, the corporation of Gloucester, the former lease of the premises granted by them, and that they should make a new lease of the premises to the plaintiff Ann Russell, and the defendant Evans, for their equal benefit for the term of thirty-one years, to commence from the expiration of the lease granted in the year 1690, and that the plaintiff Jonathan Russell, and the defendant Evans, should enter into the same covenants as were contained in Partridge's lease, and that it should be referred to the Master to settle the lease if the parties differed.

In pursuance of this decree the new lease was granted.

Upon the expiration of the lease granted in 1815, the * plaintiff, who was an heir of the body of Margaret Wood- * 655 ward, and had also obtained administration to Humphrey Holman, claimed to have a lease granted to him under the covenant contained in the deed of the 11th of January, 1529; but a suit had, at that time, been instituted in this Court by the charity trustees appointed under the Municipal Corporation Act against the corporation of Gloucester, for the conveyance to the trustees of the estates comprised in the deed, and in consequence, as it would appear, of this suit, the lease was not granted. It was stated, however, at the bar, that the corporation, in their answer in that suit, mentioned the claim of the plaintiff, and submitted, whether he ought not to be made a party to the suit. The present plaintiff, however, was not a party to the suit; and it was ultimately compromised under an arrangement made between the Attorney-General on behalf of the charities and the corporation of Gloucester, which was confirmed by an order of the Court dated the 27th of March, 1852.

The Vice-Chancellor, upon the hearing of the present cause, dismissed the bill upon the ground that the plaintiff, having been made aware of the suit which was pending when his claim was made, ought to have instituted proceedings for asserting that claim at a more early period, and that in consequence of his having neglected to do so, and not having filed the present bill until after the compromise was made and confirmed by the Court, he

had lost any equity which he might otherwise have had under the covenant contained in the deed of the 11th of January, 1829.

Mr. Craig and *Mr. Batten*, for the appellant. — The covenant amounts, in equity, to the grant of an estate tail, subject to
 * 656 a rent, which would be valid: *White v. * West*, (a) *Hudson v. Benson*; (b) and, if necessary, the Court would presume a grant or a release from the heir-at-law of the original grantor. *Smith v. Parkhurst*, (c) *Goodtitle v. Burtenshaw*. (d)

Moreover, the Court has, by its decrees made by Lord MACCLESFIELD and Lord KING, proved in the case, decided the point.

They also referred to *The Attorney-General v. The Mayor of Bristol*, (e) *Shepherd v. The Mayor of Bristol*, (g) *The Attorney-General v. The Corporation of Coventry*, (h) *Mandeville's Case*, (i) *Willan v. Willan*, (k) *The Commissioners of Charitable Donations v. Lady Clifford*, (l) *O'Keefe v. Jones*, (m) *Doe v. Perratt*. (n)

[The Lord Justice KNIGHT BRUCE referred to *Barrs v. Jackson*, (o) and *Outram v. Morewood*. (p)]

Mr. Malins and *Mr. Chapman Barber* appeared for the trustees of the charity.

Mr. Bacon and *Mr. Elderton*, for the corporation of Gloucester.

Mr. Springall Thompson, for other parties.

* 657 * Their Lordships, after hearing counsel for the appellants, directed the case to stand over that they might consider whether it would be necessary to hear the counsel for the respondents.

(a) Cro. Eliz. 792.

(b) 2 Lev. 28.

(c) 18 Vin. Abr. 413; 4 Bro. P. C. 405; 3 Atk. 135.

(d) *Fearne*, Cont. Rem. App. 570.

(l) 1 Dr. & War. 245.

(e) 2 Jac. & W. 294.

(m) 13 Ves. 413.

(g) 3 Madd. 319.

(n) 10 Bing. 198.

(h) 3 Madd. 353; 2 Bro. P. C. 236.

(o) 1 Ph. 582; 1 Y. & C. C. C. 585.

(i) Co. Litt. 26 b.

(p) 3 East, 346.

(k) 16 Ves. 72.

December 6.

THE LORD JUSTICE KNIGHT BRUCE. — The main questions in this cause are: first, as to the construction; and, secondly, as to the validity, of a provision contained in a deed of the 11th of January, in the thirty-first year of the reign of King Henry VIII., and thus worded: [His Lordship read it.]

In considering these questions it seemed to me right to be aware of the whole contents, not only of that document, but also of the will of John Coke, or Cooke, the husband of Joan Cooke, the grantor, and the grant to her from the Crown of the lands which the deed of the 11th of January comprises, and the lease from her to Partridge and others, which that deed mentions. I have accordingly read the copies of those four instruments that are among the papers in the suit. And upon the point of construction, I think it clear that the instrument of the 11th of January did not confer or intend or agree to confer on Margaret Woodward, or any child or descendant of Margaret Woodward, or of her mother, an estate of inheritance or of freehold, legally or equitably, in the lands the subject of the present dispute, or any of them. I am of the same opinion as to any right or easement or profit in, upon, or out of the lands, or any portion of them.

I am also of opinion, upon the proper interpretation of the instrument, that the plaintiff is not entitled to claim any thing in this suit, legally or equitably, in the character * which in * 658 a sense, by virtue of a grant to him made in the reign of the present Queen by the present Archbishop of Canterbury, or his immediate predecessor, he sustains of the personal representative of Humphrey Holman, who died previously to the reign of King Charles I., or in the character of a personal representative or next or one of the next of kin of any person whomsoever; and that if the plaintiff is entitled to claim any thing in the cause, legally or equitably, in any right or character whatsoever, he cannot do so otherwise than as a person designated by the deed of the 11th January. He cannot do so otherwise than as a man upon whom, though he did not come into existence before the reign of King George III., it was by the provision that I have read (contained, I repeat, in a deed of the reign of King Henry VIII.) intended to confer personally, individually, and by way of selection, an interest in the property beneficially, not by way of

charity, but by way of private gift in derogation from a gift to charity.

Such, then, seeming to me to be the answer to the question of construction, I proceed to the question of validity, in which I am unable to see any difficulty. It appears to me that certainly and plainly the plaintiff can claim nothing under such a provision; a provision which directly tends to create, and indeed purports, professes, and means to create, and, if valid, does create, a perpetuity, such as the principles and rules of the English law did before and throughout the reign of King Henry VIII. prohibit, have ever since forbidden, and do now forbid.

The plaintiff's alleged title, therefore, in my judgment, wholly fails, unless he can maintain himself by the judicial decisions proved in the cause that have taken place. For the leases * 659 that from time to time have been, * as under the provision in question, granted by the corporation of Gloucester, whether actuated or not actuated by a belief *bonâ fide* entertained (if a belief at any time was *bonâ fide* entertained by any person or body of persons) of the validity of the provision, are, I think, immaterial, notwithstanding their number and the very many years during which from time to time the corporation of Gloucester, censurably, in my opinion, permitted itself to make such leases. Since, though in favour of long enjoyment or long usage, charters¹ and grants from the Crown, as well as conveyances from corporations and individuals, and even, possibly, Acts of Parliament, may be sometimes well presumed, there cannot, I think, be a presumption of such a change in the law of the country having taken place as the plaintiff's case, in my opinion, requires to be presumed in order to enable him to repel the defence of illegality.

Have, then, the judicial decisions to which I have referred any effect in his favour? This, I think, cannot reasonably be contended for him, except as concerning the proceedings subsequent to the 17th century. But the Crown was a stranger to these; the Attorney-General was not a party to either of the suits in which the decisions were pronounced, nor was the question of the legality or illegality, the validity or invalidity, of the provision upon which the present plaintiff sues, brought into controversy, or, so far as we can judge, discussed in either of them. It does not seem that

¹ See Angell and Ames Corp. (9th ed.) §§ 69, 70.

the attention of Lord MACCLESFIELD or Lord KING was addressed to any such point, and, in my opinion, neither by way of bar or estoppel, nor by way of evidence or authority, is the present plaintiff assisted by the judicial proceedings or decisions that I have been mentioning, or any portion of them.

* I wish to add that I purposely abstain, for the present * 660 at least, from expressing any opinion as to the solidity or infirmity of the ground on which the Vice-Chancellor appears to have dismissed this bill, or as to the question, if question there is, whether Joan Cooke's deed of the 11th of January was a fraud on her husband's will, or as to the title or absence of title at any time past or future of the heirs or co-heirs, if any, either of Joan Cooke or of her husband as such heir or co-heirs.

But this appeal must certainly fail ; for in my judgment, on the ground that I have stated, it would not have been right not to dismiss the bill, and the bill has been dismissed. No costs were given. If the counsel opposed to the plaintiff wish to endeavour to persuade us to give any costs against him, they are entitled to be heard.

The Lord Justice TURNER, after stating the facts of the case, said : The plaintiff has appealed from the Vice-Chancellor's decree dismissing the bill, and having heard the counsel in support of the appeal, we thought it right further to consider the case, before calling upon the respondent's counsel to proceed with the argument ; the question for our decision being, whether the plaintiff has any equity to maintain the bill, not, whether the bill has been properly dismissed upon the particular ground on which the Vice-Chancellor has proceeded.

Had it been necessary to consider that question, I certainly should have desired to hear the defendant's counsel, before adjudicating upon the case. I do not, therefore, intend to give, and do not give, any opinion upon that point. There is, in my opinion, a sufficient * ground for dismissing this bill, with- * 661 out reference to any question as to the delay on the part of the plaintiff.

The plaintiff's title to the relief which he asks rests wholly upon the covenant contained in the deed of the 11th of January, 1729. In order to maintain his title under that covenant, it is

incumbent upon him to show, that, according to its true construction the right to the surplus rents of the estate, beyond the fixed rent, vested in some person, either in tail or in fee, within the period allowed by law for the vesting of interests; for otherwise a perpetuity would be created. That this covenant created an equitable estate in fee in the surplus rents was not, and indeed could not be, contended. It was, however, contended that it created an equitable estate tail in those rents which vested in Humphrey Holman, and has descended from him to the plaintiff; but whatever might have been the effect of this covenant, if it had been simply for the renewal of the lease to the heirs of the body of A., — and I give no opinion upon that point beyond this, that I very much doubt whether, even in that case, an estate tail would have been created in the rents, — I think it quite clear, that upon the words of the covenant as they stand, it is impossible to hold that they operate to create such an estate; for the covenant is, to grant the lease to any one of the heirs who shall claim and make request within one year after the farm shall fortune to be void. The intention therefore was, that whoever might be the heir when the farm should become vacant should have the right to the lease; but to hold an estate tail to be created would defeat that intention, for it would enable those who might be heirs, whilst the lease was running, to defeat the interests of those to whom the right to the lease was intended to be given.

It must be remembered, too, that this question arises * 662 * upon a deed, and not upon a will, to which the *cy-près* doctrine might have been called in aid. Failing the case upon the estate tail, the plaintiff has also claimed as the personal representative of Humphrey Holman; but the same argument as applies against the estate tail applies against this claim also. It was not the intention that the right to the lease should vest in him. It was to belong to those who should be heirs, and claim when the farm became vacant.

The plaintiff relied much upon the decree of 1723, followed by the decree of 1731, which was in effect merely supplemental; but the pleadings on which the decree of 1723 was founded seem to me to show that the question of perpetuity could not have been then suggested, for the corporation, in their answer, put the case as one in which the plaintiff, but for the assignment which he had

made, would have had a tenant right, and they submitted to act as the Court should direct. The case, therefore, cannot be regarded as of any authority in favour of the plaintiff.

My opinion, therefore, is, that this bill was rightly dismissed by the Vice-Chancellor, and that the appeal must be dismissed also; but I think it should be dismissed without costs.

* JEBB v. TUGWELL.

* 663

1855. December 5, 6. Before the LORDS JUSTICES.

A testator gave his property to his wife for life, and after her death to his two daughters, in such proportions as the wife should appoint, but if she made no appointment, then to be equally divided between them, and in case only one survived her mother the whole to the survivor, unless the deceased daughter should leave any children, in which case they should inherit the portion intended for their mother; and he expressed his will to be, that the fortune of each of his daughters should go to her children after her decease, in such proportions as she might direct, but if no appointment, to be equally divided between them. The daughters were both married, and the widow appointed that, after her decease, one moiety should go to such uses as one of the daughters, and as to the other moiety, to such uses as the other daughter should appoint, and in default of appointment, to them absolutely. By a settlement dated the following day, each daughter appointed her moiety to her separate use for life, with remainder to her husband for life, with remainder to her children, with cross limitations: *Held*, that the appointment and settlements were effectual, subject to the question whether the limitations of life-interests to the husbands were valid.¹

THIS was an appeal from a decision of the Master of the Rolls, reported in the 20th volume of Mr. Beavan's Reports. (a)

John Yerbury by his will gave as follows: "I give and bequeath to my dear wife, for her sole use and benefit during her life, all my property, both real and personal, on condition that she pays out of it any bequest that I may make by this my will, or by any subsequent deed or codicil. I hereby authorize my wife, with the consent of my executors, to sell or exchange any part of my prop-

(a) Page 84.

¹ See *Cooper v. Cooper*, L. R. 5 Ch. Ap. 203.

erty. I give and bequeath all my property, both real and personal, after my wife's decease, to my two daughters, in such proportions as my wife, by any legal instrument, may direct; but if she makes no appointment, then to be equally divided between them; and in case only one survives their mother, the whole to the survivor, unless the deceased daughter shall leave any children; in which case they shall inherit the portion intended for their mother. It is my will that the fortune of each of my * 664 daughters shall go to her children * after her decease, in such proportions as she may direct; but, if no appointment, to be equally divided between them."

The testator died in June, 1843, leaving his widow and two daughters, both of whom were married, Mrs. Jebb and Mrs. Blood, surviving him.

By a deed-poll dated the 23d of May, 1844, Mrs. Yerbury, by virtue and in execution of the power given to her by her husband's will, directed and appointed that from and after her decease one moiety of the real estate and one moiety of the personal estate of the testator should go and be to such uses as Mrs. Blood, notwithstanding her coverture, should at any time, by deed or will, appoint; and in default of such appointment, and subject thereto, in trust for Mrs. Blood, her heirs, executors, and administrators, absolutely. And in further exercise of her power, Mrs. Yerbury directed and appointed the other moiety of the real and personal estate of the testator, in a similar manner, to such uses as Mrs. Jebb should appoint; and in default of appointment, and subject thereto, to the use of Mrs. Jebb, her heirs, executors, and administrators, absolutely. And in further exercise of her power, Mrs. Yerbury directed and appointed that the aforesaid appointments should take effect immediately upon the execution of the deed-poll, notwithstanding that the actual enjoyment of the property which was the subject thereof was postponed until her own decease.

On the following day, by an indenture dated the 24th day of May, 1844, and made between Mrs. Blood and Mrs. Jebb, and their husbands, Major Blood and Mr. Jebb, of the one part, and the four trustees of the other part, reciting the testator's * 665 will and the deed-poll executed * on the previous day, Mrs.

Blood appointed the moiety of the testator's real and personal estate over which, by virtue of the will or deed-poll she had

a power of appointment, to the use of the four trustees, their heirs, executors, and administrators, in trust, during the life of Mrs. Blood, to apply the rents, issues, and profits, interest, dividends, and income of the said moiety as she should direct or appoint, and in default thereof, for her sole and separate use, without power of anticipation, and after her decease, in trust to pay the same to her husband, Major Blood, for his life; and directed, that after the decease of the survivor the said moiety should be in trust for all and every, or such one or more exclusively, of the other or others of the children of Mrs. Blood, by either her then present or any future husband, as she should by deed or will appoint; and in default of appointment, in trust for all such children equally, as tenants in common, &c., their interests to be vested and transmissible, if sons, at twenty-one, and if daughters, at twenty-one or marriage, with powers of maintenance and advancement. And if there should be no child of Mrs. Blood who should acquire a vested and transmissible interest in the said moiety, then it was to be held upon the same trusts for the benefit of Mrs. Jebb for life, and after her decease for Mr. Jebb for life; and after the decease of the survivor, for the benefit of their children, on the same trusts in all respects as were thereafter declared of and concerning the other moiety which was thereafter appointed by Mrs. Jebb. And upon failure of all the previous limitations, to such uses as Mrs. Blood should by deed or will appoint; and in default of appointment to her, her heirs, executors, administrators, and assigns. And Mrs. Jebb thereby appointed the other moiety, over which she had a power of disposition by virtue of the will or deed-poll, to uses and upon trusts (exactly similar to * those limited * 666 and declared by Mrs. Blood), in favour of herself, her husband, and her children; and in default of children, in favour of Mrs. Blood, her husband and children, with an ultimate limitation to such uses as Mrs. Jebb should by deed or will appoint, and in default of appointment to her, her heirs, executors, administrators, and assigns.

The Master of the Rolls held that the deed of May 23d, 1844, was inoperative and void, except so far as it appointed the property in equal moieties, and that the deeds of May 24th, 1844, were null and void.

Mr. Follett and Mr. Wickens, for the plaintiffs.—The deed of
[515]

May 23d, 1844, was substantially an appointment to the separate use of the daughters, which is within the scope of the power. *Alexander v. Alexander*, (a) *Alloway v. Alloway*, (b) *Phipson v. Turner*, (c) *Bray v. Hammersley*, (d) *Goldsmid v. Goldsmid*, (e) *Dickenson v. Mort*. (g) There could have been no question on the subject, but for the gift in the will to the children of the daughters. That gift, however, is only in the event of no appointment being made.

Mr. R. Palmer and *Mr. Shapter*, for a defendant in the same interest. — The limitation to the children, being only in default of appointment, does not affect the power; nor does the word “proportion” in the power limit it.

* 667 * They referred to *Roe v. Dunt*, (h) *Phipson v. Turner*, (c) *Woodcock v. Renneck*, (i) *Mosely v. Wakeman*, (k) *Boyle v. Bishop of Peterborough*, (l) *Crozier v. Crozier*. (m)

Mr. Baily and *Mr. Shebbeare*, for the respondents. — The last clause applies both to appointed and unappointed shares, and on the true construction of the will the widow could only determine the shares which the daughters should take, and could not modify their interest in those shares.

They referred to *Campbell v. Sandys*, (n) *Eaton v. Barker*, (o) *Campbell v. Brownrigg*, (p) *Lassence v. Tierney*. (q)

Mr. Follett, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — In this case I think that the first question proper to be considered is, What would have been the construction and effect of the will now before us if the

(a) 2 Ves. Sen. 640.

(c) 9 Sim. 227.

(b) 4 Dr. & War. 380.

(d) 3 Sim. 513; S. C. *nom.* *Bray v. Bree*, 2 Cl. & Fin. 453.

(e) 2 Hare, 187.

(m) 3 Dr. & War. 373.

(g) 8 Hare, 178.

(n) 1 Sch. & Lef. 281.

(h) 2 Wils. 336.

(o) 2 Coll. 124.

(i) 4 Beav. 190.

(p) 1 Ph. 301.

(k) V. C. TURNER, not reported.

(q) 1 Mac. & G. 551.

(l) 1 Ves. Jr. 309.

clause immediately preceding the appointment of executors, i.e., "it is my will that the fortune of each of my daughters shall go to her children after my decease in such proportions as she may direct, but if no appointment to be equally divided between them," had been omitted from the instrument, and it had stood in all other respects as it now stands? In that case it would, I think, have been clear, on authorities * which may and * 668 ought to be followed, that the widow would have had power subject to her life-interest, to appoint the whole property, and the absolute interest in the whole property, to the two daughters as tenants in common for their separate use respectively; a construction which does not seem to me prevented by the supposed meagreness of the expression "in such proportions." The words are, in my judgment, not insufficient to give the widow that extent of power.

The next question is, what (if any) is the effect of the insertion in the will of the clause which I have hitherto supposed to have been omitted. It is a clause immediately preceding the appointment of executors, and after it nothing is done besides the appointment of executors. It begins in a line of which the first word is "mother," and we are told that a mark of punctuation, a full stop, occurs between it and the preceding part of the will. That being the state of the instrument, I think that the words in question make no difference in the effect of the will in the respect to which I am referring, for, in my judgment, on reading the whole instrument, they are only applicable to the case of no appointment being made. The testator had previously provided only for the event of one daughter dying and the other not dying in the widow's lifetime. It was impossible for him to foresee whether both would die in the lifetime of the mother, or whether any issue would be left by both or either of them.

I arrive, therefore, at the conclusion, that however inartificially the will—apparently drawn by the testator himself—may be framed, the meaning and effect of the clause are merely to direct what should take place in an event which has not happened, that of the widow's failure to make an appointment. The widow then having, * in my opinion, power to appoint the whole * 669 estate, real and personal, and the absolute interest in it, to her daughters in such shares as she should think fit, executes an instrument, of which, according to my view of its construction,

the effect is to give the whole property to the two daughters as tenants in common absolutely, but so as to enable each of them during coverture to dispose of her share as if she were a single woman.

If this be the true construction of the instrument all difficulty is at an end, and my opinion accordingly is, that, since the motives of the widow in executing the deed of appointment are not impeached, and it is not suggested that there is any equitable objection to it, the two instruments now in dispute together govern the title, and must have full effect given to them according to the construction which, as I have stated, is in my opinion the right construction to put upon the former, and according to the plain tenor and purport of the latter; subject, however, to one qualification that I am about to mention. I believe that my learned brother comes to the same conclusion as I do; namely, that the two instruments govern the title; but I am not sure that he arrives at it by the same way.

The qualification to which I have alluded is this: I understand from my learned brother that he is not clear whether, if Colonel Jebb shall survive his wife, he will be in all events entitled to a life-interest in the property or any part of it. My impression is that he will be so entitled; but the doubt felt by my learned brother is enough to induce me to accede most readily to a qualification in the decree; namely, that it is to be without prejudice to any question as to the taking by Colonel Jebb of a life-interest in the property.

* 670 *THE LORD JUSTICE TURNER.—I certainly should not have ventured to give an opinion now on this will unless I had had the opportunity of very carefully considering it last night. The result of my consideration is this: I think it clear that the widow had the right to model the interests as well as to apportion the amounts of the shares.

For I think, if we look at the last clause of this will, "It is my will that the fortune of each of my daughters shall go to her children after her decease, in such proportions as she may direct," no doubt can be entertained on the question that the daughters would have had the right, as between them and their children, to model the interests of their children as well as to apportion the shares which their children would take. But I cannot put a different con-

struction on the words which give the power to the widow in the same terms, "in such proportions," from that which I put on the words which give the same power to the daughters of apportioning the interests.

Taking that, then, to be the case, the question really, in my view of it, turns upon this, — What is the effect of the last clause of this will? Now I think it is unnecessary to give any opinion on the question whether Colonel Jebb, if he should survive his wife, would take a life-interest, for that is a question which may never arise, and therefore I shall say nothing on that subject; but I think it is clear that the words "the fortune," which are contained in this clause, apply only to what the daughters may take absolutely, "It is my will that the fortune of each of my daughters shall go to her children after her decease, in such proportions as she may direct." That can only apply to interests which the daughters are to take absolutely. Those interests which they are to take absolutely * (whether in default of appoint- * 671 ment or under appointment I do not say, but those interests) are to go to the children. But they are to go to the children only in the event of there being children. If there be no children, then by this will I think they were intended to go to the other daughter and her children; and I think so for this reason, the power given to the wife is a power to appoint by any legal instrument. She might exercise that power by will. Suppose she had appointed by will the fund in moieties to the two daughters, and one afterwards had died leaving no children, and had died in her lifetime, there would have been no appointment as to the moiety which had been given to the deceased daughter. What is to be done with it? "But if she make no appointment, then to be equally divided between them; and in case only one survive their mother, the whole to the survivor, unless the deceased daughter should leave any children, in which case they shall inherit the portion intended for their mother." The case I assume is of an appointment to the two daughters by will, and one daughter dying in the lifetime of the mother leaving no children. Under that clause it is clear the surviving daughter was intended to take the whole. If, then, the second clause takes that up and reaches to the appointed share, that second clause would carry the whole fund, whether appointed or unappointed, to the children of that daughter. Now those children must take it under that last clause; that is, the clause

which says the fortune of each of the daughters shall go to the children. But taking the last clause to apply to appointed funds, as well as to unappointed funds, it is impossible to put on that clause a different construction as applied to an unappointed fund, from what you put on it as applied to an appointed fund, and consequently, whether the fund be appointed or unappointed, the same property which the daughter took must have been intended to
 * 672 be carried over from one daughter to * the other daughter and her children, in the event of the one daughter dying without children.

The result, therefore, seems to me to be this: There may be a question whether the last clause, "it is my will that the fortune of each of my daughters shall go" to her children, applies to appointed as well as to unappointed funds, and there may consequently be a question whether Colonel Jebb will be entitled under this settlement, as between him and his children, to a life-interest, but subject to that question it seems to me that both the deed of appointment and the deed of settlement following on the appointment are valid and effectual.

I think we ought to declare that those deeds are valid and effectual, subject only to any question as between Colonel Jebb and his children whether he would be entitled to his life-interest. It is not incumbent on us to decide that question: it may not arise, and I give no opinion on it.

1855. December 12. Before the LORDS JUSTICES.

A testator bequeathed a debt which he described as due to him from the legatee's late husband. At the date of the will and at the time of the testator's death the estate of the legatee's husband was indebted to a firm in which the testator was a partner, and a portion of this debt consisted of a sum for which, although originally a debt due to the firm, the husband had given a promissory note to the testator alone; against this note the Statute of Limitations had run, and it was barred by the certificate of the husband, who had become bankrupt. It had, however, been included in a subsequent account between him and the firm as a debt to the firm, and was acknowledged by him to be due: *Held*, that there was not any thing strictly answer-

ing the description contained in the bequest, and that it must be taken to apply to the testator's interest in the whole debt due to the firm.¹

Although a cause has been reheard before a Vice-Chancellor, it may be heard by the Court of appeal without special leave.²

Decree made under the 40th Order of August, 1841, without prejudice to the rights of absent parties.³

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY dismissing the plaintiff's bill, and the question was as to the operation of the following bequest contained in the will of George Richard Robinson, dated the 1st of July, 1850:—

“To Mrs. Maybery, widow of my deceased friend Charles Maybery, of Brompton, in the county of Middlesex, surgeon, the debt or sum of money she or the estate of her late husband is now indebted to me.” The testator died in August, 1850.

It appeared by the evidence, that neither at the date of the will, or of the testator's death, was Mrs. Maybery, or her husband's estate, indebted to the testator separately.

There was, however, a debt due to a firm in which the testator was a partner from the estate of Dr. Maybery, the legatee's late husband, for whom the firm acted as agents, and there had been formerly due from Dr. Maybery the sum of 100*l.* on a promissory note made payable to the testator alone, but which was really given * for a debt due to the firm, and which was more- * 674 over barred by the Statute of Limitations.

It also appeared, that, in 1841, Dr. Maybery had become bankrupt and obtained his certificate, and that at that time the promissory note was overdue, and that he was indebted to the testator's firm in a considerable amount.

It further appeared, that, in February, 1847, an account was delivered by the testator's firm to Dr. Maybery, and was approved by him as correct, although it included the promissory note which was barred by the Statute of Limitations, and the other sums due at the time of the bankruptcy and barred by the certificate. On this account a balance of 1217*l.* 15*s.* appeared due from Dr. Maybery to the testator's firm, of which amount 1000*l.* remained unpaid at his death.

¹ See 1 Jarman Wills (3d Eng. ed.), 753; *Slingsby v. Grainger*, 7 H. L. Cas. 273.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1473, 1475.

³ 1 Dan. Ch. Pr. (4th Am. ed.) 154, 291 in note.

The present suit was instituted by Mrs. Maybery, who claimed to be entitled under the bequest to the testator's interest in the whole balance due to the firm.

The cause was heard on the 1st of March, 1854, by Vice-Chancellor KINDERSLEY, who held, that the debt, on the promissory note alone, passed by the bequest and dismissed the bill.

On a rehearing before his Honor on the 25th of April, 1855, he confirmed his former decision, and the plaintiff appealed.

Mr. Swanston and *Mr. W. W. Cooper*, for the plaintiff.

[The Lord Justice KNIGHT BRUCE asked whether special leave was or was not required for an appeal after a rehearing before the Vice-Chancellor.]

* 675 * *Mr. Swanston* and *Mr. W. W. Cooper* referred to *Blackburn v. Jepson*, (a) *Pickering v. Lord Stamford*, (b) and *Brown v. Higgs*. (c)

Mr. Baily and *Mr. Giffard*, for the defendants, then objected, that the assignees of Dr. Maybery were not before the Court.

[The Lord Justice TURNER referred to the 40th Order of August, 1841, and the objection was overruled.]

Mr. Swanston and *Mr. W. W. Cooper*, for the plaintiff. — The debt due on the promissory note was barred by the Statute of Limitations, and by the bankrupt's certificate. It could not, therefore, answer the description in the will as a subsisting debt. Nor did it strictly satisfy the description independently of these considerations, the debt while due being really due to the testator as a trustee for the firm only. The only subject to which the bequest could be attributed was therefore a debt due to the testator's firm, and it must extend to the whole debt.

They referred to *Essington v. Vashon*. (d)

(a) 2 Ves. & B. 359.

(b) 2 Ves. Jr. 272, 581; 3 Ves. 332, 492.

(c) 8 Ves. 561.

(d) 3 Mer. 434.

Mr. Baily and Mr. Giffard, for the defendants. — The debt on the promissory note answers the description in the will correctly, and its existence was noticed by the testator in the account rendered by his firm. Nor was the debt itself extinguished even if the remedy for it should be held to have been barred.

Mr. Swanston, in reply.

* THE LORD JUSTICE KNIGHT BRUCE. — In this case I re- * 676 spectfully differ from the able Judge before whom it has been. The promissory note has created the only difficulty, since it must be agreed, that if a testator bequeath to a legatee a debt due from a particular person or estate, and there is at the time not in any sense a debt due from that person or estate to the testator, except a debt due from that person or estate to the testator and another person jointly, — there being in that state of things nothing strictly answering the terms of the bequest, — that which did exist and most nearly answered the description in the will must be intended by it, subject to any difficulty as to the rights of the other joint tenant.

Does then the promissory note make any difference? Dr. Maybery was dead at the date of the will, having, after giving the promissory note, become bankrupt and obtained his certificate. In one sense, therefore, if not in every sense, the debt secured by the promissory note had ceased to be due. But if it had continued to be due, it would, as appears by the evidence, have been due to the testator not on his own account, not for himself, but as a member and on behalf of the firm in which he was one of the partners. The bankruptcy does not seem to have been thought material as between the debtor and the creditors, who were on good terms, and the debt was carried forward in the books as if the bankruptcy had not taken place. The debt thus entered in the account was, in some sense, revived by an implied promise to pay, but if revived, it was so revived as to be due in every sense to the firm; for the merely formal debt was substantially extinguished.

* We think, therefore, that, under these peculiar circum- * 677 stances, the promissory note made no difference, and that the plaintiff is entitled to have the case treated as if the promissory note had no existence. The whole debt to the firm must

therefore, we think, be considered as passing, so far as the testator could give it, for the other partners had rights in the debt. But the partnership was, in a sense, dissolved by his death,¹ and he appears to have claimed the right and assumed the power of dealing by will with his share of the assets of the partnership as he thought fit. He does deal with them by the will, and having regard to the admitted circumstances and wealth of the firm, there cannot be any doubt, that, consistently with justice to the surviving partner, who is one of the executors, the accounts may be so arranged as to leave Dr. Maybery's debt as a debt attributable to the testator's estate alone, so that it would be governed by the will and pass to the plaintiff. Of course, if the surviving partner should require any accounts to be taken, or any investigation to be had, to satisfy him that no injustice will be done to him, or that, consistently with his rights, the debt can be given to the plaintiff, he is entitled to have this done. It is for him to say.

Subject to that observation, I confess, that, though I am dissenting from an opinion which I need not say I hold in the highest estimation, the plaintiff appears to me entitled to a decree.

THE LORD JUSTICE TURNER. — I also, and I need not say most respectfully, dissent from the opinion of the Vice-Chancellor in this case. I desire, however, to be clearly understood as * 678 to the * grounds on which my judgment rests; for I am apprehensive that, unless the grounds on which we proceed are clearly explained, it may be considered that principles which have been laid down on questions of this nature have been infringed upon. I proceed upon the ground that there was not, in my opinion, at the date of the testator's will, any thing in existence which strictly answered the description of a debt due from Dr. Maybery to the testator's estate.

I take it that, by the effect of Dr. Maybery's bankruptcy in 1841, and by the certificate which he obtained some time before the date of the testator's will, the debt contracted upon the promissory note was gone, and that, although, as *Mr. Baily* pointed out, it may have been revived after the bankruptcy, the debt which was so revived was revived with the firm and not with the

¹ Collyer Partn. (5th Am. ed.) §§ 113, 116, 119; *Canfield v. Hard*, 6 Conn. 184; *Burwell v. Mandeville*, 2 How. U. S. 560; *Knapp v. M'Bride*, 7 Ala. 19; *Washburn v. Goodman*, 17 Pick. 519.

testator. *Mr. Baily* argued, that it may well be that the testator may have supposed that the debt being revived with the firm was revived with him also; but, admitting that the testator may have so supposed, the question we have to consider is, whether, upon the true meaning of the will, the testator meant to refer to the sum so supposed to be due to him, or to the greater debt which was in fact due from Dr. Maybery to the firm. That I take to be the question, assuming that there is not any thing strictly answering the description contained in the will.

How does the case stand? The 100*l.* was originally secured by the promissory note of Dr. Maybery to the testator, but it was embodied in the general account between Dr. Maybery and the firm, in which the testator was a partner. When, therefore, we are called upon to say that the testator intended to refer to the 100*l.*, and not to the full amount of the debt due from Dr.

* Maybery to the partnership, we are in truth asked to suppose that the testator intended to take out of the general account between Dr. Maybery and the firm one specific sum, being an amount which had been originally due, but which had ceased to be due to him. I cannot take that to have been the intention. I think that the effect of the debt originally due upon the promissory note having been barred by the certificate, must be that we are left entirely at large upon the question, what was the intention of the testator, and to what he intended to refer by his will, and that we cannot hold that his intention was to refer to one item in the account, and not to the entire account. It seems to me that there being no debt answering the description contained in the will, we must necessarily consider that the testator intended to refer to the entire debt which was due from Dr. Maybery to the partnership and not to any debt due or supposed to be due to himself individually.

In many cases there might be difficulty in working this out, but the argument has proceeded upon the ground of admission by the executors that the accounts of the firm can be so adjusted as between the estate of Mr. Robinson and the surviving partner, that the debt due to the firm can be taken as part of Mr. Robinson's share of the partnership estate.

The decree, I think, should proceed upon this admission, and should contain a declaration founded upon it, that the executors are bound so to adjust and settle the accounts. There should

also, I think, be an admission on the face of the decree that in the month of August, 1841, Dr. Maybery became bankrupt, and that he duly obtained his certificate under the commission against him in the lifetime of the testator and before the date of the

* 680 * testator's will, and it must be declared that the plaintiff is entitled to the entire debts and to the securities for the debts. An account must also be directed to be taken of the dividends which have been received upon the shares since the death of the testator.

The decree is to be without prejudice to the title, if any, of the assignees against the plaintiff, and without prejudice, also, to any question as between the plaintiff and the parties interested under the will of her husband, whether the shares ought to be considered as part of the estate of her husband, or whether she takes them beneficially.

* 681

* In the Matter of BAKER.¹

BAKER v. BAKER.

1855. December 3, 13. Before the LORDS JUSTICES.

A testator gave his real and personal estate in trust to invest thereout such a sum as that the dividends or interest thereof should realize the clear annual income of 200*l.*, and pay it to his wife during widowhood, and to stand possessed of the principal in trust for the testator's brothers and sister; and he gave the residue of his estate, after raising the money sufficient to realize the annuity for his wife, to his brothers and sister. On the assets proving insufficient to provide a capital sum which would yield 200*l.* per annum, *held*, by Lord Justice KNIGHT BRUCE, confirming the decision of the Master of the Rolls, *dissentiente* Lord Justice TURNER, that the widow was entitled to have the amount paid in full out of capital.²

THIS was an appeal from the decision of the Master of the Rolls, reported in the 20th volume of Mr. Beavan's Reports. (a) The question was, whether an annuitant under a will was entitled to

(a) Page 548.

¹ S. C. reversed, 6 H. L. Cas. 615.² See Wright v. Callender, 2 De G., M. & G. 652, and cases in n. (1); Birch v. Sherratt, L. R. 2 Ch. Ap. 644.

payment out of the *corpus* of the fund appropriated to the payment of the annuity.

By the will the testator devised and bequeathed his residuary estate to a trustee, upon trust for conversion, and to stand possessed of the proceeds upon trusts thus expressed: "Upon trust to raise thereout, and invest in the parliamentary stocks or funds of Great Britain, or upon mortgage or other good security, such a sum of money as when so placed out or invested the dividends or income thereof shall realize the clear annual income or sum of 200*l.*, and do and shall pay to or permit and suffer my said wife Elizabeth to receive and take such dividends, interest, or annual income, by two equal half-yearly payments, for and during the term of her natural life, provided she shall so long continue my widow, but not otherwise. And from and after her decease or second marriage, whichever shall first happen, it is my will, and I further declare, that in case I shall die without issue the said trustee shall stand possessed of the said principal or trust moneys, and the stocks, funds, and securities in or * upon * 682 which the same shall be invested, upon trust for himself and my other brothers, Walter Baker and James Baker, and my sister Louisa, the wife of Thomas Grant, in equal shares and proportions." Then followed directions for settling the sister's share. The will then proceeded as follows: "And as to the residue of the said trust moneys arising from my real and personal estate and effects, after raising thereout the money sufficient to realize the annuity for my said wife, I hereby further declare that the said trustee shall stand possessed thereof, upon trust for himself and my said brothers and sister, in equal shares and proportions, in such and the like manner precisely, and subject to the like uses, trusts, conditions, and declarations with reference to my sister's share therein, as are hereinbefore expressed and contained respecting the other trust moneys herein bequeathed to them."

The residuary estate was insufficient to provide a fund the income of which would produce more than 100*l.* per annum; and the Master of the Rolls, on the authority of *Wright v. Callender*, (a) held that the *corpus* was applicable to make good the full annuity of 200*l.* per annum.

The persons interested in the fund after the death of the widow appealed.

(a) 2 De G., M. & G. 652.

The Solicitor-General and *Mr. J. H. Palmer*, for the appellants. — They referred to *Attorney-General v. Poulden* (a) and *Croly v.*

Weld, (b) and distinguished the present case from *Wright* * 683 *v. Callender*, (c) by adverting to the * circumstance, which existed in the present case and not in that, of a fund having been directed to be set apart, of which (after the life-interest of the plaintiff) the *corpus*, instead of being allowed to fall into the residue, was specifically disposed of. They contended, that the circumstance of the legatees in remainder being also the residuary legatees, made no difference in this respect, as they took the residue under a distinct bequest.

Mr. Willcock and *Mr. Shebbeare*, for the widow, referred to *Wright v. Callender*, (c) *Davies v. Wattier*, (d) *May v. Bennett*, (e) *Foster v. Smith*, (g) *Wroughton v. Colquhoun*, (h) *Ex parte Wilkinson*, (i) *Ingleman v. Worthington*, (k) *Mills v. Drewitt*. (l)

Judgment reserved.

December 13.

THE LORD JUSTICE KNIGHT BRUCE. — This appeal complains of the manner in which the Master of the Rolls has construed the will of Mr. George Baker, the testator in the matter and cause, as being too favourable to the respondent, his widow; the Master of the Rolls having in effect declared that an annuity of 200*l.* per annum is bequeathed to her during her life or widowhood, and that, otherwise than subject to the payment in full of that annuity, the other legatees take nothing.

The executor, who is one of them, contends that the widow * 684 can (besides a specific bequest to her, not in * dispute) claim nothing beyond the income, during her life or widowhood, of the clear personal estate, not specifically bequeathed, and of the real estate, if any, which income does not amount to 200*l.* per annum.

The question seems to me difficult, though whether, without the

(a) 3 Hare, 555.

(b) 3 De G., M. & G. 993.

(c) 2 De G., M. & G. 652.

(d) 1 S. & S. 463.

(e) 1 Russ. 370.

(g) 1 Ph. 629.

(h) 1 De G. & Sm. 36.

(i) 3 De G. & Sm. 633.

(k) 1 Jur. N. S. 1062.

(l) 20 Beav. 632.

authorities cited in the course of the argument, it would have been more or less, or neither more nor less, difficult, I am not prepared to say. But having reconsidered those authorities, and some few others, perhaps less relevant, and having read the will again and again, I have been unable to satisfy myself that the conclusion of the Master of the Rolls is erroneous. The inclination of my opinion is, on the contrary, rather with that of his Honor.

The language of the will leads me to infer that the testator's wife was the principal object of his care and bounty, and the other legatees but secondarily so. The gift to the testator's brothers and sister and their children (the only legatees besides the wife, as there was no issue of the testator) is in form divided into two portions, one particular and one residuary, but rather seems to me to be in substance residuary altogether. It is in one mass that the whole of what is given to the brothers and sister and their children is taken from them, in favour of the testator's issue, if any.

The will contains the word "annuity," with reference to the provision during widowhood made for the wife; and on the whole, after much consideration, though I have not a confident opinion as to the construction of this instrument, the impression upon my mind is, that the testator meant to express, and, however awkwardly, and in phraseology however cumbersome, has expressed, the wish, that there should be secured to his wife an annuity *of 200*l.* a year during her widowhood, and the inten- * 685
tion that the brothers and sister and their issue should not take any thing, otherwise than burdened with paying that annuity.

However possible, therefore, it may be, that had the Master of the Rolls decided against the widow I might not have ventured practically to differ, I cannot, as matters are, give a voice for varying what he has done. I think that the widow should neither pay nor receive any costs of the appeal, and that, at least as against her, the appellants' costs of the appeal should not fall on the estate.

THE LORD JUSTICE TURNER. — I regret to say, that after repeatedly considering this will, I am unable to agree with the construction which the Master of the Rolls has put upon it, and to which my learned brother has given his assent. I think that, upon the

true construction of the will, it creates the relation of tenant for life and remainder-man, and not of annuitant and residuary legatee. [His Lordship read the terms of the trust.]

It does not seem to me that the intention to create a trust fund, the income of which should be enjoyed by the widow during her life or widowhood, could have been expressed in terms more clear and unambiguous; and although, in the residuary clause, the widow's interest is spoken of as an annuity, it is so spoken of, not as standing by itself, but in connection with the money by which it is to be realized. I think this expression too loose and doubtful to warrant us in deviating from the clear intention previously expressed by the testator. It is not, I think, an unfair test, in * 686 cases of this description, * to consider whether the intention could be that the reversion of the fund to be set apart should be liable to be sold for the purpose of making good the interest of the first taker, and I see nothing upon this will which indicates such an intention.

It was strongly argued on the part of the widow that the case was governed by the authorities. It is fair to say that I think the authorities have gone far enough upon this question, but still if they had appeared to me to reach this case I should have preferred abiding by them to setting up my own opinion against them. I have looked, however, into all the cases which were cited, and into several others, and none of them appear to me to go so far as it is necessary to go in order to maintain this decree. By far the strongest cases in favour of the widow are those of *May v. Bennett* (a) and *Wright v. Callender* (b) (for I take the case of *Mills v. Drewitt* (c) to have been decided entirely upon the authority of *Wright v. Callender*), and both those cases seem to me to be distinguishable from the present.

In *May v. Bennett* (a) the fund producing the annual interest was to fall into the residue upon the death or marriage of the widow. The reversioners, therefore, could take nothing except as residue, and there could be no residue until the fund producing the full annual income was set apart, for which purpose the reversion of the annuity fund might, as I apprehend, have been sold.

The case of *Wright v. Callender*, I agree, comes nearer to the present, but in that case also the fund producing the annual

(a) 1 Russ. 370. (b) 2 De G., M. & G. 652. (c) 20 Beav. 632.

income was in the first instance directed to go into * the * 687 residue. From this disposition Lord CRANWORTH, as I understand his judgment, drew the same conclusion as had been drawn in *May v. Bennett*, that the first gift was intended to be an annuity, and then he considered that the subsequent disposition of the capital fund evinced no intention to alter the character of the first gift. My learned brother was in that case also of opinion that an annuity was intended; but in this case I have been unable to satisfy my mind that there was any such intention.

My learned brother, however, agreeing in opinion with the Master of the Rolls, of course the appeal must be dismissed.

FRY v. NOBLE.

1855. December 13. Before the LORDS JUSTICES.

In a purchase deed of earlier date than the Dower Act, the usual limitations to bar dower were expressed to be to the intent that the then present or any future wife of the purchaser might not be entitled to dower: *Held*, by Lord Justice KNIGHT BRUCE, *dubitante* Lord Justice TURNER, that this was not a sufficient declaration to exclude the dower of a widow to whom the purchaser was married after the passing of the Act.¹

THIS was an appeal from the decision of the Master of the Rolls, reported in the 20th volume of Mr. Beavan's Reports. (a)

By an indenture of release dated the 8th of August, 1827, certain real estate was conveyed to the use of such persons as Thomas W. Fry (who was then married) should by deed appoint, and in default of appointment to the use of Thomas W. Fry for life, and after the determination of that estate by any means in his lifetime to the use of John Fitch, his executors and administrators, during the life of Thomas W. Fry, upon trust for Thomas W. Fry, "and to the intent that the present or any future wife of the said Thomas W. Fry shall not be entitled *to dower," with re- * 688 mainder to the use of Thomas W. Fry in fee.

(a) Page 598.

¹ Sugden V. & P. (14th Eng. ed.) 205, 457; Lewin Trusts (5th Eng. ed.), 527; Clarke v. Franklin, 4 K. & J. 266.

His then wife having died, he married the plaintiff in September, 1838, and died intestate in October, 1842, without having exercised the power of appointment contained in the deed of 1827.

His heir-at-law entered into possession, and executed a mortgage with power of sale, under which it was sold to the defendant. The widow then instituted this suit to have her dower set out.

The Master of the Rolls held the widow entitled to dower, and the defendant appealed.

Mr. Follett and *Mr. Wickens*, for the plaintiff. — But for the words “to the intent that the present or any future wife of the said Thomas W. Fry shall not be entitled to dower,” there would be no question to argue. As, however, these words were used before the Dower Act passed, they could not have been intended to operate under that Act, and cannot therefore have any operation under it. The words of the 6th clause of the Act cannot be construed retrospectively, so as to apply to a declaration made before the Act passed. And the 14th section of the Act removes all doubt, by providing expressly that the Act shall not give to any will, contract, engagement, or charge executed, entered into, or created before the 1st of January, 1834, the effect of defeating or prejudicing any right to dower.

Mr. R. Palmer and *Mr. T. Stevens*, for the appellant. — The respondent has no right to dower unless the Act gives it to her. The words “right to dower,” in the 14th section, do not mean a right given by the Act, but a right existing when the Act * 689 passed. The absence of the word “declaration” in that section is more in the appellant’s favour than any thing else in it is against her. This is an Act of Parliament creating a new right. There is no preamble to it, nor any thing but the words of the enactment to explain its object or intention. The 2d section provides that where a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land. And the 6th section must be read in connection with this and as qualifying it,

when it says, that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land. The words "it shall be declared" do not confine the operation of the Act to future deeds. It is not necessary so to construe them, for the words "shall be declared" are used here, as in many other legislative provisions, potentially, and mean "it shall be found declared," the expression being only intended to provide that the predicated state of circumstances shall be found to exist when the Act is to operate. The respondent's argument is, in fact, nothing else than that a new deed ought to have been executed containing the same words as the existing one. But what would be the use of requiring this? Why should the new deed, which the husband might execute at any time, be more effectual than the old one, which contains all that the Act requires for the purpose of excluding dower? At all events costs should not have been given, it being the rule not to give them in suits for setting out dower.

* *Mr. Follett*, in reply. — On the question of costs he referred to Seton on Décrees. (a) * 690

THE LORD JUSTICE KNIGHT BRUCE. — The Dower Act passed in the year 1833. The marriage of the plaintiff took place after the year 1834. The conveyance, upon which the question arises, was made in the year 1827. The controversy is as to the effect of the words "and to the intent that the present or any future wife of the said T. W. Fry may not be entitled to dower." But for these words it is admitted that the plaintiff would have a right to the dower which she claims. Have they any operation or effect against her? They were, when used, merely superfluous, operating nothing; and they were used under a state of the law which had ceased to exist before the plaintiff's marriage, and with reference to that state. They were not used with reference to the law as it has stood since the Dower Act, and cannot, I conceive, be made to apply to rights under the new law introduced by it. A power given in 1833 can hardly have been executed by something written in 1827.

(a) Pages 332, 333 (2d ed.).

I think the Master of the Rolls right. I think that his Honor was also right as to the costs of the suit; but with regard to the costs of the appeal, the Master of the Rolls having expressed doubt upon the case, and the Lord Justice TURNER not being satisfied as to the correctness of the decision appealed from, I consider that, though the decree will stand, there should be no costs of the appeal.

* 691 *THE LORD JUSTICE TURNER. — As my learned brother has so strong an opinion that the decree was right, I am probably entirely wrong in feeling a doubt on the subject, but I confess that my mind is not satisfied as to the decision, and I give no opinion upon it.

FIELD *v.* MOORE.

FIELD *v.* BROWN.

1855. December 17. Before the LORDS JUSTICES.

Where a ward of Court married without consent, and after she attained her majority executed, by the direction of the Court, a settlement of real estate to which she was equitably entitled, but did not acknowledge the deed according to the Fines and Recoveries Act, *held*, that her heir was not bound.¹

Under a covenant that if the covenantor's wife survived him, he, his heirs, executors or administrators would pay her a specified annuity for life, and that, for better securing it, he or his heirs would grant and secure the same out of a sufficient part of the real estates devised to him by a particular will, *held*, that the real estates were only secondarily liable, and that the personal estate of the covenantor was the primary fund.

THIS was an appeal from a decree of the Master of the Rolls, reported in the 19th volume of Mr. Beavan's Reports, (a) declaring ineffectual, — as against the plaintiff, the heir-at-law of his mother, — a settlement made, after her marriage, under an order of the Court.

(a) Page 176.

¹ See *Sharpe v. Foy*, L. R. 4 Ch. Ap. 35; *Hill Trustees* (3d Am. ed.), 71, 72 and note; *Levering v. Heighe*, 2 Md. Ch. 81; *Levering v. Levering*, 3 Md. Ch. 365; *Wilson v. McCulloch*, 19 Penn. St. 77; *Perry Trusts*, § 34.

The father of Esther Brown, to whom the property in question belonged, had three children, John, Esther, and James. He made his will, by which he devised his real estate to trustees, in trust to be settled, as to one portion of the estates, in trust for his son John, for life, with remainder to his children, as tenants in common in tail, with cross remainders between them in tail, and in default of such issue to be divided between and go to Esther and James, in equal moieties, one moiety to be settled upon Esther, for her life, with remainder to her children as tenants in common in tail, and in default of * such issue to go to James * 692 for his life, with remainder to his issue in tail; and in default of such issue to the testator's right heirs. And as to the other moiety, to James for life, with remainder to his children, as tenants in common in tail; and in default of such issue, to Esther, for her life, with remainder to her children, and if she died without issue, to the testator's right heirs.

A second portion of the testator's estate he directed to be settled on Esther for life, for her separate use, without power of anticipation, with ulterior limitations, exactly similar to those already stated as to the first portion, except that John and his children were substituted for Esther and her children.

The third and remaining portion was settled on exactly similar trusts, but beginning with James, and the remainder was in favour of John and Esther, and their issue. The ultimate remainder, in all cases, was to the testator's right heirs.

The testator died on the 28th of February, 1842. His eldest son, John, died in July, 1844, an infant, and without issue; so that the ulterior limitation, on his death, took effect, as to his share, in favour of Esther and James and their children.

In 1846 a bill was filed by Esther, then an infant, by her next friend, for the purpose of having the trusts of the father's will executed under the direction of the Court.

In June, 1847, when eighteen years of age, she married a person of the name of Samuel Brown, without the sanction of the Court, under circumstances of great culpability on the part of Samuel Brown, and by an * order dated the 25th of August, * 693 1848, it was referred to Mr. Tinney to approve of a proper settlement of all the property to which Esther was entitled upon herself and her children, and excluding Samuel Brown.

The report of the Master was delayed, for some reason that did

not appear, for three years, and in the mean time Esther had, on May 31, 1850, attained her age of twenty-one years. Afterwards, on the 25th of June, 1851, the Master made his report, approving of the terms of a settlement, according to which Samuel Brown was to covenant to execute all proper deeds for vesting the real and personal estate of Esther Brown in trustees, who were to hold the property upon trusts for sale and for the benefit of Esther Brown and her children, excluding Samuel Brown from the enjoyment of any portion of the then existing property of Esther. On the 5th of July, 1851, the Court made an order directing that the settlement should include any property to be thereafter acquired by Esther Brown, and, subject to that addition, confirmed the Master's report.

On the 30th of December, 1851, a deed was accordingly made between Samuel Brown of the first part, Esther of the second part, and three trustees of the third part. It recited the institution of the suit for carrying into execution the trusts of the father's will, the marriage of Esther, and the order of the 25th of August, 1848. It then recited the report of the Master at length, which contained a statement of the trusts of the will of the father, and the order of the 25th of June, 1851. It then recited that the Master had approved of the deed in question as a proper deed, by a report on the 16th of December then instant, and had directed that it should be executed by all the parties thereto. The indent-

ure then witnessed, that in pursuance of the said order of * 694 the 5th day of * July, 1851, and for and in consideration of the premises, he the said Samuel Brown did thereby, for himself, his heirs, executors, and administrators, covenant with the trustees that he the said Samuel Brown, his heirs, executors, and administrators, and all persons lawfully or equitably claiming or to claim any estate, right, title, or interest whatsoever, by, from, under, or in trust for him, them, or any of them, of and in the real and personal property hereinafter covenanted to be settled, or any part thereof, would, when thereunto required by the trustees, make, do, and execute all proper conveyances for vesting in the trustees all the real and personal estate and effects whatsoever and wheresoever of or to which the said Esther Brown, or the said Samuel Brown in right of Esther Brown, or any person or persons in trust for them or either of them in such right as aforesaid, was or were then seised or possessed or entitled, in

possession, reversion, remainder, expectancy, or contingency, for any estate, right, title, or interest whatsoever, or which at any time thereafter should by any descent, transmission, demise, gift, donation, representation or otherwise descend to or devolve upon or vest in the said Esther Brown or the said Samuel Brown, or his executors or administrators, in her right for any estate or interest whatsoever, either at law or in equity, in possession, reversion, remainder, expectancy, or contingency, with the exception therein mentioned, which was that of the life-estate of Esther Brown in the estates by the will of her father directed to be settled on his son John and his issue, and which, under the order of the 5th of July, 1851, was to be conveyed and settled to the separate use and benefit of the said Esther Brown, as therein mentioned. After giving a power to the trustees to sell the real estate and convert it into personalty, and after limitations to Mrs. Brown for life, with remainder to her issue, there was an ultimate trust in default of issue thus expressed: "Under * and subject to * 695 such further provisos, agreements, and declarations (not being for the benefit of the said Samuel Brown) as she the said Esther Brown shall, whether covert or sole, by her last will and testament in writing, or any codicil or codicils thereto, direct or appoint, and in default thereof then to her own next of kin according to the statute."

The settlement was executed by all the parties to it, including Esther Brown, but no conveyance of the real estate had ever been executed, nor had she ever acknowledged any deed under the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74). Her brother James attained twenty-one, married, and afterwards, on the 12th of May, 1853, died without issue, and thereupon the reversion in fee in all the real estates descended on her. On the 8d of May, 1853, and on the 30th of July, 1853, orders were made directing that the trustees of the testator's will, and all other necessary and proper parties to the suit, should join in and execute proper deeds, to be settled by the Judge, for settling the testator's estates, according to the directions contained in his will, having regard to the subsequent events. A settlement was prepared in chambers, but never executed.

Esther Brown made her will on the 23d of November, 1853, whereby she purported, by virtue of her power,* to appoint the whole property to the defendant Wingfield.

She died without issue on the 5th of December, 1853, and thereupon the plaintiff, as her heir-at-law, filed the bill in the present suit praying that it might be declared that the plaintiff, as her heir-at-law and customary heir, became upon her death absolutely entitled to all the freehold, copyhold, and life leasehold estates devised by the will of the testator or purchased by the trustees of his will since his death.

* 696 * Besides the question as to the validity of the settlement as against the heir, which was that principally argued, there was another raised by the bill, and which arose under the marriage settlement of James Field. This settlement contained a covenant with the trustees that if the intended marriage should take effect, and James Field's wife should happen to survive him, then and in such case, and from and after his decease, his heirs, executors, and administrators, should pay or cause to be paid to his said wife or her assigns during her life, if she should so long continue his widow, but not otherwise, for her or their own use an annuity of 200*l.*; and that for the better securing the said annuity the said James Field and his heirs should, if and so far as he lawfully could, and by such conveyances and assurances as counsel should advise, grant and secure the same out of a sufficient portion of the hereditaments devised to or in trust for him by the will of his late father James Field, and thereby directed to be settled to or for the use and benefit of him the said James Field and his assigns, with such power of distress and entry and other powers and provisions as were applicable thereto.

With reference to this settlement the bill prayed that it might be declared that the personal estate of James Field, the son, was the primary fund for the satisfaction of the annuity of 200*l.* secured by the indenture of the 2d of November, 1852, and that a competent part of such personal estate might be set apart to indemnify against such annuity the freehold, copyhold, and life leasehold estates to which the plaintiff was entitled.

Mr. Rolt, Mr. Osborne, and Mr. Erskine, for the plaintiff. —

They contended that the Court had no jurisdiction to
* 697 * bind the wife's property, and referred to *Savill v. Savill*, (a) *Taylor v. Philips*, (b) *Harvey v. Ashley*, (c) *Durn-*

(a) 2 Coll. 721.

(b) 2 Ves. Sen. 23.

(c) 3 Atk. 607.

ford v. Lane, (a) Wood v. Patteson, (b) Russel v. Russel, (c) Simson v. Jones, (d) Stamper v. Barker, (e) Lassence v. Tierney, (g) Frank v. Frank, (h) Jordan v. Jones, (i) Clough v. Clough. (k)

They also referred to *Master v. De Croismar, (l) Butcher v. Butcher, (m) Calvert v. Godfrey, (n) Ramsden v. Smith. (o)*

On the question as to the personal estate being primarily liable for payment of the annuity, they contended that the case was distinguishable from *Loosemore v. Knapman (p)* and *Lanoy v. Duke of Athol, (q)* and that the real estate was only secondarily liable.

The Solicitor-General (Sir RICHARD BETHELL), Mr. Greene and Mr. Jones Bateman, for the defendant Wingfield, the appointee under Mrs. Brown's will. — First. Esther Brown's estate was purely equitable, and the Court had therefore power to bind it by its orders without the necessity of any formal legal assurance.

Such an interest is, in its nature, neither *jus in re* nor *jus ad rem*, but is founded simply on confidence in the person, and is therefore not subject to rules applicable to legal estates. It is created by mere contract or agreement, * and capable * 698 of being transferred by a manifestation of intention indicated by any form of words being "governed by intention not coerced by form." *Smith v. Frederick, (r) Sanders's Uses and Trusts. (s)*

With respect to such an estate, the order of the Court is completely effectual, and the beneficial interest is as conclusively bound by it for all purposes, whether of transfer, charge, or declaration of ownership, as it could be by any instrument executed by the owner of the equity. And it is the constant practice of Court, in analogous cases, such as sales under a decree, to direct the conveyance to be executed only by the owners of the

- (a) 1 Bro. C. C. 106.
- (b) 10 Beav. 541.
- (c) 1 Moll. 525.
- (d) 2 Russ. & Myl. 365.
- (e) 5 Madd. 157.
- (g) 1 Mac. & G. 551.
- (h) 3 Myl. & Cr. 171.
- (i) 2 Ph. 170.
- (k) 5 Ves. 710.

- (l) 11 Beav. 184.
- (m) 14 Beav. 222.
- (n) 6 Beav. 97.
- (o) 2 Drew. 298.
- (p) Kay, 123.
- (q) 2 Atk. 444.
- (r) 1 Russ. 174.
- (s) Vol. I. p. 377.

legal estate, the order of the Court binding all equities. *Re William's Estate*, (a) *Whitla v. Haliday*, (b) *Head v. Lord Teynham*, (c) *Hutton v. Mayne*, (d) *Wakeman v. The Duchess of Rutland*. (e)

In the next place, this Court has power to contract on behalf of a married woman, and to enforce performance of the contract. The disability of coverture differs from that of infancy, with which it has been confounded in the argument on the other side. Here Mrs. Brown was an adult when she executed the settlement. The disability of infancy is want of discretion, which the Court cannot remove; that of coverture arises from marital influence against which the Court has the means of providing. Courts of Law did so by a fictitious action, and Courts of Equity by examination. This consideration distinguishes the case from *Savill v. Savill*, (g) *Taylor v. Philips*, (h) *Harvey v. Ashley*, (i) and

the other cases referred to on the other side. In the * 699 *Earl of Buckingham v. Drewry*, (k) the general question was argued in the House of Lords, whether, with the sanction of this Court, a valid jointure could be made upon an infant so as to bar her dower, and Lord HARDWICKE said: "But it is objected, that the Court of Chancery does no more than the father or guardian, the best it can, but the infant has the same privilege to waive when she comes of age. When this was the only answer given by so able an advocate as the Solicitor-General, I conclude it unanswerable, for this is no answer at all. It is saying no more than that this great Court draws in and deludes families. People think when they resort to that Court in respect of infants, that it has a sovereign jurisdiction for what they do, and that trustees and all are indemnified, and what is so done must be in the case of infants. It is improper for me to mention my own precedents, but in this practice I followed a great example, Lord NOTTINGHAM (and here his Lordship enumerated all the Chancellors, including Lord TALBOT). Have they all concurred to draw in and delude families? If this should be law, every one of

(a) 5 De G. & Sm. 515.

(b) 4 Dr. & War. 267.

(c) 1 Cox, 57.

(d) 3 Jo. & Lat. 586.

(e) 3 Ves. 504.

(g) 2 Coll. 721.

(h) 2 Ves. Sen. 23.

(i) 3 Atk. 607.

(k) 2 Eden, 60.

us deserved to have been impeached as being guilty of the greatest abuse and delusion of families. Such a series of practice and precedents make the law. A great part of the common law is so. What therefore might not be the consequence of overturning all this established course?"

In this case, there exists no necessity for the safeguard and protection of the Court through the medium of a fine or deed acknowledged — no possibility of marital influence — proceedings having been taken to annul the marriage, and all intercourse between husband and wife having been interdicted. "Cessante ratione cessat et lex." In such a case Lord Chancellor MANNERS said, "From * the adverse manner she acted towards her * 700 husband, she must be considered as a *feme sole*." *Burke v. Crosbie*. (a)

Moreover, there is a distinction between cases where the order has been merely administrative, and where there has been adverse litigation or a proceeding upon a contempt. A further material consideration is, that there has been here an absolute decree for conveyance, which converted Mrs. Brown as to the whole of her estate into a trustee, and her heir may consequently be directed to convey according to the direction of the Court already given; and the Court, in cases of election and in foreclosure suits, is in the constant habit of binding the estates of married women. *Mal-lack v. Galton*, (b) *Ardesoife v. Bennet*, (c) *Cavan v. Pulteney*, (d) *Turner v. Turner*. (e)

A further ground for holding the decree to have been binding on Mrs. Brown is, that she was the plaintiff, and thereby submitted her rights and interests to the direction of the Court. *Austen v. Halsey*. (g) It is a familiar distinction, that even an infant is bound by the result of a suit instituted by himself, though he would not have been if he had been merely a defendant.

And, lastly, the Court, for the protection of married women, has many times made orders binding their real property, so as to give them the same control over it as far as possible as if coverture did not exist. *Sturgis v. Champneys*, (h) *Newenham v. Pemberton*. (i)

(a) 1 Ball & B. 489.

(b) 3 P. Wms. 352.

(c) 1 Dick. 463.

(d) 2 Ves. Jr. 544.

(e) 2 De G., M. & G. 28.

(g) 2 Sim. & St. 123, n.

(h) 5 Myl. & Cr. 97.

(i) 1 De G. & Sm. 644.

* 701 * They also referred to *Mary Portington's Case*, (a) *Rippon v. Dawding*, (b) *Oldham v. Hughes*, (c) *Milner v. Lord Harewood*, (d) *Drury v. Drury*, (e) *Wright v. Cadogan*, (g) *Birkett v. Hibbert*, (h) *Simson v. Jones*, (i) *Re Walker*, (k) *Hanson v. Keating*, (l) *Hobson v. Ferraby*, (m) *Baldwin v. Baldwin*, (n) *Cave v. Cave*, (o) *Hewison v. Negus*, (p) *Blackie v. Clarke*, (q) *Ex parte Blake*, (r) *Martin v. Foster*, (s) *Williams on Executors*; (t) and with reference to the question of the annuity, *Graves v. Hicks*, (u) *Loosemore v. Knapman*, (v) and *Lanoy v. Duke of Athol*. (w)

Mr. R. Palmer and *Mr. Walford*, for the trustees.

Mr. Follett, *Mr. Shapter*, *Mr. Rogers*, and *Mr. Shebbeare*, for the other parties.

Their Lordships desired the case to stand over that they might consider whether it would be necessary to hear a reply.

December 17.

THE LORD JUSTICE TURNER. — Some of the cases which were cited in the argument in the present case having been decided by my learned brother as Vice-Chancellor, he has requested

* 702 me to deliver * our joint opinion on the present appeal.

The language of the judgment, therefore, will be considered as attributable to me, but we are perfectly agreed in the conclusion at which we have arrived.

This bill is filed by John Joseph Field, the heir-at-law and customary heir of Esther Brown, the late wife of the defendant Sam-

(a) 5 Rep. 43.

(b) Amb. 565.

(c) 2 Atk. 452.

(d) 18 Ves. 259.

(e) 2 Eden, 39.

(g) 2 Eden, 239.

(h) 3 Myl. & K. 227.

(i) 2 Russ. & Myl. 365.

(k) Ll. & G. 299.

(l) 4 Hare, 1.

(m) 2 Coll. 412.

(n) 5 De G. & Sm. 319.

(o) 15 Beav. 227.

(p) 16 Beav. 594.

(q) 15 Beav. 595.

(r) 16 Beav. 463.

(s) 7 De G., M. & G. 98.

(t) Page 1445.

(u) 6 Sim. 391.

(v) Kay, 123.

(w) 2 Atk. 444.

uel Brown, praying that it may be declared — [his Lordship read the prayer].

The bill, therefore, presents two questions: 1st, the question as to the plaintiff's title to the estates, and 2d, the question as to the annuity of 200*l*. The two questions are perfectly distinct, and in disposing of the case it will be convenient to deal with them separately; and, first, as to the title to the estates.

The facts are these: [His Lordship stated them.]

In this state of circumstances the plaintiff's title to the estates depends upon the question, whether the power to appoint by will given to Esther Brown by the settlement of 30th December, 1851, was well created. If the power was well created, there is no doubt that it was well exercised, and the plaintiff has no title.

In determining this point as to the creation of the power, I have found it convenient to consider the question: first, as it would stand in simple cases; and secondly, as it stands under the special circumstances presented by the case before us.

Let us suppose, then, in the first place, a marriage between adults, and an agreement before the marriage for a settlement of the wife's real estates under which such a power of appointment was agreed to be reserved to her. * Would the power * 703 in such a case be well created? In the case supposed, the wife would have been competent to contract, and would have contracted, for the creation of the power. Upon principle, therefore, there can be no objection to its validity, nor is authority wanting to show that it would be valid. It was so determined in *Wright v. Lord Cadogan*, (a) upon review of the doubt expressed by Lord HARDWICKE in *Peacock v. Monk*. (b)

It is to be observed, however, that every passage in the judgment in *Wright v. Lord Cadogan*, (a) which has reference to this subject, is strictly confined to the case of antenuptial contract. The judgment indeed is so carefully worded in this respect as of itself to suggest the doubt whether such a power contained in a post-nuptial settlement could be supported.

Let us suppose, then, in the case which has been put of a marriage between adults, that there is no antenuptial agreement, but a post-nuptial settlement is made of the wife's real estate, containing such a power of appointment, — would the power be valid?

(a) 2 Eden, 239.

(b) 2 Ves. Sen. 190.

Upon principle it would seem to be clear that it would not, for the wife's capacity to contract, which gave validity to the power in the case of the antenuptial agreement, is gone by the marriage. She has become incapable of contracting. On this point also authority concurs with principle. That such a power, created by a post-nuptial settlement, would not be valid was held by Lord REDESDALE in *Dillon v. Grace*, (a) and by Lord HARDWICKE in *Churchill v. Dibbin*. (b) In that case there had been a settlement made on

the marriage of Thomas Dibbin and his wife, by which the
 * 704 wife conveyed several lands and tenements * to the use of herself for life, and afterwards, in strict settlement, to the issue of the marriage, and in default of issue, as to part, to the use of the husband; as to the other part to the trustees and their heirs, who were to stand seised in trust to and for the benefit and behalf of such person and persons, and for such estate, as she should, notwithstanding her coverture, by deed or will or any writing, purporting to be so signed and sealed by her in the presence of two witnesses, appoint. It appears, I think, that the wife had in that case a large separate income, and with that separate income she had purchased a freehold estate; and she had afterwards, in the exercise of her power given to her by the settlement, given the residue of her estate; and the question arose whether one particular estate, which she had contracted to purchase, but the contract for which had not been completed, passed under the execution of her power. The case involves a great deal of discussion upon the subject of powers of appointment of this description, and the creation of those powers. At page 72 of the report I find this passage in the course of the argument of *Mr. Henley*: "The question was, first, whether the testator had any right under the power by will to dispose of the after-purchased estates, being the produce of her separate estate." I find that question followed by this statement of the Lord Chancellor: "Upon this it was argued, and the Chancellor agreed, that an agreement between husband and wife that the wife should be at liberty to dispose of her personal estate will enable her to do so; and the Solicitor-General said, that where a woman has a separate estate, the Spiritual Court will grant probate to her will, though there be no such agreement." Then the Lord Chancellor proceeds thus: "But no

(a) 2 Sch. & Lef. 456.

(b) 9 Sim. 447, n.

agreement between husband and wife giving her leave to dispose by will of a real estate will be of any effect, because it is a third person in this case, the heir-at-law of the woman, * that * 705 would be defeated by it, which he cannot be by such a will, unless the lands were conveyed to trustees, reserving to the *feme covert* a power of appointing uses, in which case it would be good, for the appointment takes its force from the conveyance. Separate personal estate of the wife, therefore, though by agreement she had power to dispose of it, if she lays it out in lands, and those lands are accordingly conveyed to her use, those lands cannot be disposed of by a will during her coverture." And in a later passage of the same judgment the same subject is dealt with more fully by the Lord Chancellor. At page 84 he deals with the question of her power to appoint the estate which had been purchased, but the purchase of which had not been completed. "Another question there is in respect to the lands contracted for with William Saunders, whether she could devise those lands, as they were purchased by her out of her separate personal estate. Where a *feme covert* has a separate personal estate, the general rule of the Court has been, that she may dispose of it, or of any personal thing, purchased with or arising from it, and several cases have been so determined; but if part of that personal estate is laid out in the purchase of lands, though those lands are the fruit of and do arise from that separate estate, there is no authority to say she may dispose of them, for there comes in another person, an heir-at-law, to be disinherited, and he cannot be bound by any agreement of the husband. If there be an agreement between husband and wife, intended to enable her to dispose of lands, however strong, it would be of no force, for by no method can an heir-at-law of a *feme covert* be disinherited but by proper conveyance, fine, declaration of use, or appointment, by vesting the whole in trustees in trust for such person as the wife shall appoint, as the power is here, or by limiting it to such use as she should appoint; and then, when she makes an appointment, by * the Statute * 706 of Uses, that appointee takes from the original conveyance in which the power is created, and not from the particular instrument by which it is executed. Where lands are purchased after, there is no trust, no use, that can give force to an appointment of them. But then with respect to Saunders, the contract not being executed" (that contract which had been made for the purchase

of the estate from Saunders not having been carried into effect), "he, it is said, must be considered as a trustee; yet, as it is considered as a thing done, it must have the same legal and equitable constructions. I agree he is in certain cases to be considered as a trustee, but had this been conveyed to trustees? A *feme covert*, without a particular power, can no more appoint a trust estate than a legal one. Therefore, as the purchased lands are not such as she had a power over, I am of opinion they cannot pass by any part of her will, but must go to the heir-at-law."

Such, then, being the state of the law with reference to powers of appointment over their real estates given to married women by articles and settlements made upon and after their marriage when adults, let us next suppose the wife to be an infant at the time of the marriage and the settlement containing such a power to be made before the marriage and with the full consent of the parents or guardians of the infant. Would the power be valid in such a case? That the infant could not contract is plain. Could the parents or guardians contract for her? The fee of an infant's estate does not vest in the guardian, and during the minority of the infant, the guardian holds only as a trustee. Even if authority, therefore, was wanting on the point, it would be difficult to hold that any contract by the guardian could bind the real estate of the infant. It is, however, well settled by the authorities, that

* 707 parents or guardians have no power * to bind the real estates of their infant wards by settlement made upon their marriages. It was so held by Lord NOTTINGHAM in *Salisbury v. Bagott*. (a) In that case, estates were agreed to be settled upon the marriage of William, the plaintiff's grandfather, to uses under which the plaintiff would have been tenant in tail. Some of the estates were afterwards settled upon a younger son of William, and Sir Walter Bagott, the defendant, being the husband of the daughter of the younger son, claimed under the latter settlement. A suit being instituted by the plaintiff to recover the estates, Sir Walter Bagott set up the defence that he was a purchaser for value, without notice of the articles, and Lord NOTTINGHAM addresses himself in his observations to this point: "And here the first thing to be considered in point of fact is, the time when Sir Walter Bagott became a purchaser. Plainly, not at the time of his

(a) 2 Swanst. 608.

marriage; for his lady was an infant, and could not contract for her estate, though she might contract for her person; and, *ergo*, articles to settle her estate are void, and avail not in the case."

Now although some doubt seems afterwards to have grown up on the point in consequence of what fell from Lord MACCLESFIELD in *Cannel v. Buckle*, (a) the later authorities have removed that doubt. It is sufficient on this head to refer to the decision of Lord THURLOW in *Clough v. Clough*, (b) and the *dicta* of Lord ELDON in *Milner v. Harewood*, (c) and of Sir JOHN LEACH in *Simson v. Jones*. (d) I am aware of no more modern authority having the least tendency to controvert this point.

* If the power would not be valid in an antenuptial settlement, it is hardly necessary to say that it could not possibly be valid in a post-nuptial one; but if authority be desired on this point also, what is said by Sir JOHN LEACH, in *Stamper v. Barker*, (e) seems to be decisive upon it.

In that case, first of all, there had been a marriage of the lady entitled to personal estate, then there had been the separation, and during her minority articles entered into for apportioning the interest of the husband and wife in the property of the wife, in consequence of the separation; and the father of the lady had joined in these articles. Sir JOHN LEACH says: "If the plaintiff's husband had survived her mother, and the property had come into possession" (the plaintiff, it must be observed, claimed the whole property, alleging that she was not bound by the deed of separation), "the provision made for the wife by the deed of separation would have been a full satisfaction for her equity, being the share which the Court usually attributes to the wife." (The deed of separation had divided the property into moieties.) "But whether, in the event which has actually happened, the wife, as against the representatives of the husband, is, by the deed of separation, effectually excluded from her title by survivorship. At the time of this deed, the lady, as an infant, was incapable of contract; she was also incapable of contract as a *feme covert*, and especially of contract with her husband. As far, therefore, as this deed is to be considered as the act of this lady, it must be a mere nullity. It is said that her father was party to this deed on her behalf, and that

(a) 2 P. Wms. 243.

(d) 2 Russ. & Myl. 365.

(b) 5 Ves. 710.

(e) 5 Madd. 164.

(c) 18 Ves. 259.

he could well contract for her. It is true, that the law of
 * 709 this Court permits the father or guardian of a female * infant
 to contract on her behalf with her intended husband as to
 her personal estate, because otherwise it would become his prop-
 erty, and, as to her jointure, because her benefit and the con-
 venience of families require it. But there is no principle or
 authority for stating that, after marriage, a parent or guardian can
 bind the interest of an infant *feme covert* by contract with her hus-
 band. I am of opinion, therefore, that the title of the wife by
 survivorship is unaffected by this deed."

I may here mention, that the statute, passed in the last year (a)
 for the purpose of enabling settlements to be made on the mar-
 riage of infants, certainly gives a very strong confirmation to the
 opinion that the infant's estate could not be bound by the consent
 on the part of their parents or guardians.

The cases to which I have hitherto referred are cases in which
 the infants have not been wards of the Court. Let us next sup-
 pose the case of the infant being a ward of the Court and marry-
 ing with the Court's approbation, and upon a settlement before the
 marriage approved by the Court, containing the power of appoint-
 ment. Would the power in this case be good? We have already
 seen that parents and guardians have no authority to contract so
 as to bind the real estates of their infant wards, and although the
 Court of Chancery has of course greater powers of enforcing its
 control over its wards than the law has given to parents, I can see
 no principle on which it can be held that it has, as the guardian of
 infants, any greater power of contracting on their behalf, as to
 their real estates, than belongs to their parents, their natu-
 * 710 ral guardians.¹ The case of *Savill v. Savill* (b) is a * dis-
 tinct authority against the existence of any such power in
 the Court.

From what has been already said, and from the authorities to
 which I have referred, it is, I think, to be collected that no valid
 settlement of a female infant's real estates can be made upon her
 marriage by virtue of any agreement on her part, or on the part of
 her parents or guardians, or by the authority of this Court. Let
 us now proceed to consider the case before us, that of a female
 infant ward marrying without the consent of the Court, and a set-

(a) 18 & 19 Vict. c. 43.

(b) 2 Coll. 721.

¹ Schouler Dom. Rel. 529.

tlement after the marriage of the infant's real estates, containing the power of appointment. Is the power valid in such a case? There is the same incapacity on the part of the ward to contract, and the same want of power on the part of the Court to contract for the ward, as presents itself in the preceding cases. But it is said that the contempt gives the Court the jurisdiction, and so far was this argument carried, that it was asserted that even if the infant had the legal estate it would be in the power of this Court to make a settlement which would be binding upon her. No authority, however, was cited for this position, either in its extended form as applying to an infant having a legal estate, or in any more modified form; and, looking at the question in the absence of authority, there can, I think, be no doubt that the position cannot be supported.

The jurisdiction of this Court in the guardianship of infants has, or at least is supposed to have had, its foundation in the rights which the Crown possessed as *parens patriæ*, and was so treated in the argument before us; but, so far as I am aware, no trace is to be found of the Crown having ever had or exercised the right of disposing of an infant's estate upon the ground of the infant's *marriage without the Crown's consent. The *711 foundation of the argument, therefore, fails to support it.

But if the Court, in the case of contempt, had the power of settling the real estates of its infant wards, must it not have followed up that power by compelling the infants to give effect to the settlement of which it approved on their behalf? No instance, however, was cited of its having done so, nor do I believe that there is any such instance to be found. On the contrary, the cases of *Jordan v. Jones* (a) and *Foxon v. Foxon* (b) show that the Court cannot exercise such a power. What, however, has seemed to me to be decisive upon this subject is this, that in the case of the marriage of two infants, one being a ward of the Court, it is not in the power of the Court to compel a settlement to be made by either of the infants during their minority, even of the infant ward's personal estate.

This difficulty presented itself in the case of *Blood v. Branfill*, (c) in which I was counsel, and with the proceedings in which Mr. LEACH has been kind enough to furnish me. In that case

(a) 2 Ph. 170.

(b) 2 Ph. 172, n. (b).

(c) Not reported.

Ashburnham Henry Bulley, an infant, intermarried without leave of the Court with Frances Ellen Blood, also an infant and a ward of the Court. Miss Blood was entitled to very considerable property, the whole of which was personal. It consisted in part of 13,000*l.* and upwards consols, which the infant was entitled to thus: she was to have maintenance out of the residue of the fund until twenty-one, and it was to be transferred to her at twenty-one,

and on her dying under twenty-one without issue, it was to * 712 go over. She had also * made some accumulation from the allowance which had been made to her for maintenance, and that had been invested in the joint names of herself and mother. The executor or trustee of the will had also some property, which had been invested in the joint names of himself and the infant.

The marriage being in contempt, the guardian of the infant ward presented the usual petition to bring the case under the consideration of the Court, and A. H. Bulley was then ordered to attend, and attended accordingly accompanied by his father, his natural guardian. The case was not one which required to be visited with commitment; and by the order which was made upon the parties attending before the Lord Chancellor, and which bore date the 21st of February, 1834, the Court directed the re-marriage in England, the parties having been married in Scotland, in order to preserve the evidence of the marriage, and directed a settlement to be executed by the guardians of each of the infants. The Master under that direction approved of a settlement of the whole of the property of the infant on her and her children, and by an order of the 4th of July, 1834, the report was confirmed, and it was ordered that the Master should approve of a settlement in pursuance of the articles to which he had before given his sanction. A deed of settlement was accordingly executed and certified by the Master, in which was introduced a covenant of the guardian of the infant husband, that the infant husband would, on attaining twenty-one, execute the settlement, and the infant was also named as a covenanting party in the settlement. He afterwards attained twenty-one, and executed a settlement in pursuance of the covenant, and thereupon an order was made by which the trust funds were to be transferred to the trustees upon the trusts of the settlement.

* 713 * My recollection of this case enables me to state, that

upon the hearing of the petition first presented by the guardian, it was very much considered, on behalf of the infant ward and of her infant husband (who was represented on that occasion by Lord COTTENHAM, then Solicitor-General), and by the then Lord Chancellor, whether any valid settlement of the infant's property could be made, it being desired by all parties that there should be such a settlement, but it was thought that it could not be done. Independently of my own recollection, the orders which were made prove, I think, most clearly, that this was the opinion of the Court. The property of this ward was wholly personal. By far the greater part of it was actually in Court, and if it had been thought that a valid settlement could be made, the Court would of course have, in the first instance, directed that upon the infant attaining twenty-one, the funds should be transferred to the trustees upon the trusts of the settlement, and have thus bound the funds by those trusts. It would not have rested on the order upon the guardian to execute the settlement, and afterwards on the guardian's covenant that the infant should execute it, neither of which it could have considered to be effectual, for had it considered the settlement to be valid, it would not have kept alive the application as to the contempt.

In addition to the cases to which I have hitherto referred, there are other cases relating to the power of binding the real estates of infants, which are not less worthy of attention. I mean the cases of *Durnford v. Lane* (a) and *Caruthers v. Caruthers*, (b) and there are also cases as to the personal estates of infants, which are not less strong to show the absence of power on their part and on the part of their parents and guardians and *the *714 limited power of this Court to make any complete settlement upon their marriages during their minority. If upon the marriage the personal estate vests in the husband, and he is adult, the Court can of course enforce the settlement of it; but if the property does not vest in the husband, as in the case of reversionary interests, or of personal estate settled to the separate use of the infant, the infant cannot be absolutely bound by any settlement which the Court may make. *Simson v. Jones* (c) and *Johnson v. Johnson*. (d)

(a) 1 Bro. C. C. 106.

(c) 2 Russ. & Myl. 365.

(b) 4 Bro. C. C. 500.

(d) 1 Keen, 648.

The case of *Drury v. Drury* (a) was relied on upon the part of the appellant, but that was a case of jointure governed by statute, and the general observations on the subject before us, which are contained in the report of the case, and were cited for the appellant, are wholly displaced by the later authorities.

Some argument in support of the appellant's view of the power of the Court in cases of contempt was attempted to be derived from the case of *Hobson v. Ferraby*, (b) but I do not find that it was even intimated in that case that the wife could have been held bound by the settlement of her real estate approved by the Court, if that settlement had been executed. The case goes no further, than that the husband might have been held bound by the terms which had been approved of by the Court, and that the wife might have been relieved against the settlement which was actually executed, — positions which are quite consistent with the wife's not being bound as to her real estate.

The appellant's view of the law on this subject was * 715 * also attempted to be supported by reference to the cases of *Cave v. Cave*, (c) *Blackie v. Clarke*, (d) and *In re Blake*, (e) decided by the Master of the Rolls. As to these cases, it would be sufficient perhaps to observe, that they were decided by the same Judge who has decided the present case. I may, however, observe, that the case of *Cave v. Cave* (c) has appeared to me to be rather against than in favour of the appellant's argument; for, in that case, the Court did not hold Mrs. Cave to be bound by any of the settlements. I think it right also to add, that I am not prepared to go the length of some of the *dicta* in *Blackie v. Clarke*, (d) or of the *dicta* or the decision in *Re Blake*. (e) It may well be, however, that, although the *dicta* in those cases may go too far, the decision in the former of them may be right, and in the latter questionable only so far as it directed the fund to be paid to the trustees upon the trusts of the settlement, for the settlements might be binding upon the husbands, although not upon the wives, and this Court might not permit the husband to aid the wife in defeating the settlement, according to the opinion intimated by Lord THURLOW in *Durn-*

(a) 2 Eden, 39.

(d) 15 Beav. 595.

(b) 2 Coll. 412.

(e) 16 Beav. 463.

(c) 15 Beav. 227.

ford v. Lane, (a) which is most important to be borne in mind in these cases. It was observed, upon the case of *Cave v. Cave*, (b) that the Court referred it to the Master to approve of a settlement, and that this is the constant habit of the Court, upon the marriage of its infant wards, and from this practice it was sought to be inferred, that the Court must, in all these cases, have intended that the ward should be bound. But if this was the intention of the Court, it would surely have gone further and compelled the wards, to give effect to the settlements, which, so far at least as I am aware, there is no instance of its * having done. There * 716 are indeed sufficient reasons for the Court approving of the settlement during the minority without this supposed intention being imputed to it, for the settlement binds the husband, and puts it in the power of the wife to compel him to give effect to it if she thinks proper to adopt it; whereas, in the absence of the settlement, the husband might not be bound, and the wife might have no power of enforcing a settlement of the estate at any time during the coverture.

Some argument was attempted to be founded on the equity of the wife to a provision for maintenance out of the income of her trust estate, but this equity rests on a wholly different ground; upon the obligation which this Court attaches upon the husband when he is compelled to resort to it for assistance.¹ It does not follow that the wife is competent because the husband is bound.

The case, on the part of the appellant, was further argued on this ground, that the estate of the wife being here equitable, the decree of the Court would bind her equitable interest, and many instances were mentioned in which the equitable interests of married women were held bound by decrees; but all these instances were either cases in which the Court enforced a right which was paramount to that of the married woman, or a right which the married woman herself had duly created, or they were cases of election in which the interests of third persons were concerned. Cases of the first class are wholly different from those of settlements made by the Court upon the marriage of its infant wards. In the cases of such settlements there is no paramount right; there can be no right duly created by the ward; but the Court acts merely with a view to the benefit of its ward. And

(a) 1 Bro. C. C. 106.

(b) 15 Beav. 227.

¹ See *Scott v. Spashett*, 3 Mac. & G. 599, n. (2), and cases cited.

the cases of election are equally inapplicable to a case like * 717 the present. If upon the marriage of the ward * a settlement was made by the husband, it is possible that some case of election might arise as in *Savill v. Savill*. (a) But in this case there was no settlement by the husband. The marriage was a gross contempt of the Court. The Court deprived the husband of the interest which he took by the marriage in the real estates of the wife, and settled that interest for the benefit of the wife; and the act of the Court, in depriving the husband of his interest, certainly could not be made the foundation of a case of election against the wife. To give it that effect, and validate the settlement on such a ground, would be to deprive the wife of the absolute interest in her real estates in consequence of a contempt.

Reference was also made in the course of the appellant's argument to some cases in which the Court has taken the consent of a married woman to take as personal estate money directed to be laid out in the purchase of land; but these cases also bear no analogy to the present. They point to the mode in which the election may be made, not to the right to make it. So far, indeed, from aiding the appellant's case, they seem to me to have a contrary tendency, for they are distinct upon the point that the election cannot be made by deed, or otherwise than by consent.

The appellants also relied upon the distinction between the disability of infancy and the disability of coverture; but this distinction also has seemed to me to be any thing but favourable to the appellant. If the Court has no power to deal with the real estates of an infant, who is by law incompetent to deal with such estates, it would be strange that it should have the power to deal with the real estates of married women, who, to some * 718 * extent at least, have themselves power to deal with them.

The law has empowered married women to alienate their estates, whether legal or equitable, by deed acknowledged in the particular form pointed out by the statute, and upon their being separately examined. It has, and for the wisest reasons, given them no further power. What we are asked now to do is, to bind the estate of a married woman by a deed not duly acknowledged, and without the separate examination which the statute prescribes.

(a) 2 Coll. 721.

In my opinion, this Court has no power whatever to do so, and what the appellant asks us to do seems to me to be no more or less than directly to contravene the statute. It may be useful to refer to *Lassance v. Tierney* (a) upon this point.

The appellant's case was also presented to us in this point of view: that nothing more was necessary on his part than to show the due creation of the power to appoint by will, and that it was competent to the husband to give the wife this power. The case of *Rippon v. Dawding* (b) was relied on in support of that position. But it is clear that that case proceeded upon the ground of there having been an antenuptial agreement. Lord CAMDEN, in the judgment, speaks of the agreement made on the marriage, and the bond recited such an agreement. On examining the record in the case it appears that the bill alleged that there was such an agreement, and that the answer, though it did not deny the agreement, insisted that there was no evidence of it, save by the bond, and put the plaintiff to the proof of it: but this also appears by the record, that the bond was attested by a person who was then heir-apparent of the wife, and who afterwards, upon her death, became her heir; that he survived her for some time, and did * not dispute the title of her devisees, which * 719 was questioned only by his heirs after his death. Whether, under these circumstances, it was properly considered that there was sufficient evidence of an agreement on the part of the wife, it is quite unnecessary to say. It is sufficient that it was so considered, and that the case, therefore, furnishes no authority for the appellant's position. Apart from that authority, I find no trace of any such doctrine as the appellant has contended for, and, upon principle, I see no ground on which it could be supported. How could the husband, to whom the law gives no interest in the fee of the wife's estates, create in her a power to dispose of the fee of those estates? How could such a doctrine be applied in a case like the present consistently with what is said by Lord HARDWICKE in *Churchill v. Dibben*. (c)

Without reference, then, to any confirmation by Mrs. Brown, I consider it to be beyond all doubt that the settlement in this case was not binding upon her inheritance, and that the power to appoint by will, given to her by that settlement, was not well

(a) 1 Mac. & G. 551.

(b) Amb. 565.

(c) 9 Sim. 447, n.

created. Was there then any such confirmation on her part as could render the settlement binding or the power operative? I think that there was not. By the order of the 5th day of July, 1851, it was ordered, that all proper parties should execute the settlement. The Master directed her to execute it, and she executed it accordingly; but of what avail is the execution of a deed by a married woman? None of the safeguards which the law throws around a married woman, upon the execution of deeds affecting her estates, were observed. There was no acknowledgment, no

separate examination, nor was any acknowledgment or any
 * 720 separate examination ordered. The execution * of the deed, therefore, by Mrs. Brown was of no avail. She had the right to receive, and, as I presume, did receive, the income of her estates for her separate use; but assuming that the receipt of income by a married woman for her separate use may, as possibly it may in some cases, be considered sufficient to constitute a case of confirmation, although on this point I give no opinion, I think, for the reasons already given, it cannot so operate in a case like the present. The creation of the separate estate is not her act, but the act of the Court. The receipt of the income is the consequence of that act. She obtained an order, on the death of James, that the reversion should be included in the settlement; but how is it possible to give the same effect to this order as would have been due to a deed acknowledged with a separate examination? The test of this order is, whether, after she had obtained it, this Court could have compelled her to acknowledge a deed for giving it effect. I consider it clear, both upon principle and authority, that it could not.

It was attempted on the part of the appellant to derive some aid to his argument from the settlement upon the marriage having been connected with the settlement directed to be made in execution of the trusts of the will, but I see nothing in the connection of these settlements which can assist the appellant's case. The result is simply this, that the settlement upon the marriage is comprised in the two instruments, instead of being comprised in the marriage settlement alone; but neither the one instrument nor the other was binding upon the inheritance.

I have said nothing upon the trust for sale contained in the settlement, nor do I think it necessary to do so. That this Court has no power to change the character of an infant's estate,

upon the notion of the change being * beneficial to the in- * 721
fant, is now too well settled to admit of its being disputed.

Upon the whole case, I am of opinion that, upon the question of title, this decree is altogether right, and the appeal must wholly fail. I have entered into the case perhaps more fully than it was necessary for me to do. I hope it will not be supposed that I have done so from any doubt felt by me upon the subject. I have done so only from an apprehension lest the law upon this very important question should become unsettled, and from a desire that, so far at least as my opinion is concerned, no doubt should rest upon it.

There remains, then, only the question as to the annuity, and I am of opinion that the decree is right in this respect also. The question depends upon the construction of an instrument, to which I have not yet referred,—the settlement upon the marriage of James Field, dated the 2d of November, 1852. By that settlement there was an absolute covenant for payment of the annuity, and a covenant for securing the annuity upon the estates, which he took under the limitations of the testator's will. The covenant, therefore, is merely for better securing the annuity. It is a covenant in aid, and in aid of the personal estate which has before been made liable by the covenant. The case is wholly different from *Loosemore v. Knapman*, (a) which seems to me to have been well decided.

The appeal, therefore, must be dismissed.

* PHELPS v. PROTHERO.

* 722

PROTHERO v. PHELPS.

1855. December 4, 22. Before the LORDS JUSTICES.

A plaintiff who has legal rights in a matter on which he comes to this Court for its aid, is bound to put those legal rights under its control, and cannot proceed on them at law without its leave.¹

In a case decided before the 21 & 22 Vict. c. 27, came into operation, *held*, that

(a) *Kay*, 123.

¹ See *Kerr Inj.* 104, 539.

the Court has jurisdiction to award damages for the want of a literal performance of a contract, of which it directs the specific performance, and will in general do so, rather than compel the parties to resort to another forum.¹ Where a defendant to an action pleaded unsuccessfully an equitable plea grounded, not on equitable principles, but on the course and practice of a Court of Equity: *Held*, that he was not precluded by the decision at law from filing a bill on the same grounds for an injunction to restrain proceedings in the action.²

THIS was an appeal from an order of Vice-Chancellor STUART granting an injunction to restrain proceedings at law.

By arrangement the cause was brought on for hearing with the appeal motion. The details of the transaction which led to the litigation are stated in the report of *Phelps v. Prothero*; (a) but the following summary, which is transposed to this place from the judgment of Lord Justice TURNER, will be found sufficient for the purposes of this report.

The defendant William Truman Phelps was formerly the lessee of some mines belonging to Thomas Prothero, the testator of the now plaintiffs.

In the year 1844 Thomas Prothero brought an action against the defendant for breaches of the covenants contained in the lease. This action was compromised by an agreement dated the 12th of August, 1844, upon the following terms: Certain money payments were to be made by the defendant, and the defendant was to be discharged from all further liability to the rents and covenants of the lease on assigning to Thomas Prothero all his estate and interest in it.

* 723 * The defendant had mortgaged the lease, and could therefore assign only subject to the mortgage; and Thomas Prothero being advised that such an assignment would not be a due performance of the agreement, brought a second action against the defendant for breaches of covenant in the lease.

He recovered judgment in this action, and the defendant then, in the year 1857, filed a bill in this Court to restrain the further proceedings in this action, and to have a proper release executed to him from all further liability to the rent and covenants in the

(a) 2 De G. & S. 274.

¹ See 2 Dan. Ch. Fr. (4th Am. ed.) 1080, 1081, and cases in notes; Sugden V. & P. (14th Eng. ed.) 55, 233.

² See Kerr Inj. 26, 27; Sugden V. & P. (14th Eng. ed.) 401.

lease, offering to assign such interest as he had in it; in effect a bill for the specific performance of the agreement of the 12th of August, 1844. In this suit the defendant obtained an injunction against further proceedings in the action, and the injunction was continued upon the terms of paying money into Court, but the defendant ultimately failed in paying in the money, and the execution was issued upon the judgment.

Upon the affidavits now before the Court it appeared that some goods of the defendant were taken under the execution, and that the result of the proceedings upon the judgment was to break up the defendant's business. The defendant, however, went on with the suit in this Court, and ultimately succeeded in obtaining a decree, dated the 13th of March, 1849, for a perpetual injunction against further proceedings under the judgment, and against any further action upon the covenants in the lease, and this decree gave the defendant the costs of the suit with certain exceptions, but not any costs of the proceedings at law. By the decree either party was to be at liberty to apply as there should be occasion.

Having obtained this decree in the month of March, * 1849, the defendant, in the month of December in that * 724 year, commenced an action at law against Thomas Prothero seeking to recover damages for alleged breaches on his part of the agreement of the 12th of August, 1844, and in the month of February, 1850, he declared in that action.

The declaration, after reciting the proceedings above mentioned, was to this effect: That in pursuance of the agreement the record in the action was withdrawn, and the payment of 210*l.* made to Thomas Prothero deceased; that the now plaintiff at law, from the time of the making of the said agreement until the committing of the grievances thereafter mentioned, was always ready and willing to do and perform all things on his part to be performed to entitle him to be discharged by Thomas Prothero deceased from all liability to the rents and covenants of lease, of which Thomas Prothero deceased had notice; that the plaintiff, before the committing of such grievances, offered to the said Thomas Prothero deceased to assign to him all the estate and interest of the plaintiff in the said lease, and requested the said Thomas Prothero to perform the said agreement on his part, and a reasonable time for such discharge as aforesaid elapsed before the committing of such grievances, yet that the said Thomas Prothero deceased did not nor

would discharge the plaintiff from such liability, but refused so to do and therein made default, and wrongfully discharged the plaintiff from making an assignment of the said lease, and refused in any manner to perform such agreement on his the said Thomas Prothero's part, and afterwards wrongfully and in breach of the said agreement charged the plaintiff with further liability on the covenants of the said lease, and sued the now plaintiff thereon in the Court of Exchequer for certain alleged breaches by him * 725 of the same; and afterwards, by the consideration * and judgment of the last-mentioned Court, recovered judgment against the now plaintiff in such last-mentioned action for a large sum of money; and afterwards wrongfully, and in further breach of the said agreement, issued execution on such judgment and caused the goods of the now plaintiff to be seized and sold under the same; and also issued on such last-mentioned judgment a writ of *capias* against the now plaintiff, and the plaintiff was put to and incurred great expense in endeavouring to defend himself against the said action and in relation thereto, and in taking proceedings in chancery to restrain the said Thomas Prothero from pursuing the same; and the plaintiff lost the said goods so seized and sold as aforesaid, and had been greatly impoverished and injured in his credit and circumstances and prevented from carrying on his profession of an attorney, and subjected to great pecuniary loss, and the plaintiff claimed 10,000*l*.

Thomas Prothero demurred to this declaration, and upon argument the demurrer was allowed, but leave was given to amend upon payment of costs.

No further proceedings were had in the action in the lifetime of Thomas Prothero, who died in the year 1853, and was represented by the plaintiffs on the present record. But after his death, and in the month of March, 1855 (the Common Law Procedure Act having been in the mean time passed), the defendant paid the costs required to be paid by him as the price of amending, revived the action against the plaintiffs, the representatives of Thomas Prothero, and amended the declaration, without, however, altering it in substance.

The plaintiffs pleaded to the amended declaration, and their 15th plea, entitled, according to the statute, "on equitable grounds," was as follows:—

* 726 * That after the said agreement in the declaration

mentioned had been made between the plaintiff and the said Thomas Prothero deceased, the plaintiff not having assigned his estate and interest in the said lease mentioned in the said agreement, and certain arrears of the said rents and royalties being due to the said Thomas Prothero deceased, under the said indenture of lease of the 20th of February, 1840, in the declaration mentioned, the said Thomas Prothero deceased sued the plaintiff in the Court of Exchequer for the recovery of such arrears of the said rents and royalties as aforesaid, and in respect of divers breaches of covenant committed by the plaintiff, and that thereupon such proceedings were had and taken in the said action that the said Thomas Prothero deceased obtained judgment against the plaintiff as in his said declaration in this action was mentioned. That the plaintiff thereupon, on or about the 26th of January, 1847, and whilst the said judgment so obtained by the said Thomas Prothero deceased against the plaintiff as aforesaid was unsatisfied, filed his bill of complaint against the said Thomas Prothero deceased in the Court of Chancery, being a Court of competent authority and jurisdiction in that behalf, for the purpose of obtaining specific performance of the said agreement in the declaration set forth, as well as relief in respect of the alleged breach of the said agreement mentioned in the said bill and in the declaration in this action, and in and by such bill he stated and set forth the said agreement and the alleged refusal of the said Thomas Prothero deceased to discharge the plaintiff from further liability to the rents and covenants of the said lease in the said agreement mentioned; and prayed that the said Thomas Prothero deceased might be restrained by the order and injunction of that Court from further proceeding with the said action so brought by him and then pending in the exchequer against the plaintiff, and from commencing any fresh * action or actions against the plain- * 727 tiff for arrears of rent reserved by the said indenture of lease of the 20th of February, 1840; and that the said Thomas Prothero deceased might be decreed to execute to the plaintiff a release or discharge from all further liability to the rents and covenants of the said lease, the plaintiff thereby offering to assign to the said Thomas Prothero deceased all the plaintiff's estate and interest in the said lease in such manner as that Court should direct; and that the said Thomas Prothero deceased might be ordered to pay to the plaintiff the costs incurred by him in and

about his defence to the said action, and also the cost of that suit. That divers proceedings were had and taken in the said suit, and that the said cause came on to be heard and debated before the said Court in the presence of counsel for the plaintiff and the said Thomas Prothero deceased; and the said Court did, on the 3d of March, 1848, make an order in the said suit, whereby it was referred to one of the Masters to make certain inquiries which the Court thought fit to direct, with a view to the final adjudication of the matters in and by the said bill alleged and complained of; that the said inquiries directed by the said order were made by one of the said Masters, and further proceedings were had and taken in the said Court in the said suit; and afterwards, on the 13th of March, 1849, the said cause coming on to be debated before the said Court in the presence of the counsel for the plaintiff and the said Thomas Prothero deceased, the said Court made a final decree in the said suit, and did in and by such decree, amongst other things, order that the plaintiff should, within a fortnight from that time, pay unto the defendant the sum 100*l.* for principal due upon the bill of exchange in the pleadings in such suit mentioned, together with interest thereon, and thereupon that

an injunction be awarded to restrain the defendant in that
* 728 suit from taking any * proceedings under the judgment obtained by him in the action at law in the pleadings mentioned, and from bringing any further actions in respect of the rent of the premises in question in the said cause, and the covenants in the lease mentioned or referred to in the agreement entered into between the plaintiff and the defendant bearing date the 12th of August, 1834, in the pleadings mentioned, and that such injunction be made perpetual; and that it be referred to the taxing master of the said Court to whom the said cause stood referred to tax the plaintiff his costs of that suit, but the said taxing master was not to allow the plaintiff any costs of three several orders bearing date respectively the 3d of July, 1847, and the 15th of November, 1847, and the 15th of December, 1847; and it was ordered that such costs, when taxed, after deducting the sum of 10*l.*, be paid by the defendant in the said suit to the plaintiff. That the said Thomas Prothero deceased paid all the costs allowed to the plaintiff by the taxing master, and in all things obeyed and performed the said decree so made as aforesaid. That all the said supposed causes of action and grievances in the declaration

in this cause mentioned existed, and that the plaintiff had notice thereof at the time of filing his said bill against the said Thomas Prothero deceased as aforesaid. That the subject-matters of complaint contained in the plaintiff's said bill, and upon which the said decree was so made as aforesaid, were the same as in this action, and that the contract in respect whereof the plaintiff sought and obtained relief in and by the said suit was and is the same agreement which was set forth in the declaration in this action, and that the alleged breach thereof complained of in the said suit was and is the same alleged breach whereof the plaintiff had complained in this action, and not another or different agreement or breach; and that such decree as aforesaid was and is a final decree and adjudication of the Court * of Chancery * 729 between the plaintiff and the said Thomas Prothero deceased upon and in respect of the said agreement; and that, according to the rules and practice of the Court of Chancery, after such final decree and adjudication so made the said Thomas Prothero deceased was, and the defendant's executors as aforesaid were and would be, entitled to relief on equitable grounds against a judgment if obtained for the plaintiff in this action.

To this plea the defendant demurred, and the Court of Common Pleas, upon argument, held the plea to be bad. (a)

Under these circumstances, the plaintiffs filed their bill in the present suit, to restrain the defendant from proceeding in the action. The Vice-Chancellor granted the injunction, and upon appeal to the Lords Justices it was agreed that the cause should be heard with the appeal motion.

Mr. Malins and *Mr. Whitbread*, for the plaintiffs. — *Mr. Phelps*, by filing a bill for specific performance in this Court, elected to sue in equity, and could not proceed at law upon the same matter. In *Frank v. Bassett*, (b) Lord LYNDHURST said: "Supposing that there was improper delay in the Master's office, the whole proceedings were before the Court, and it was competent to the party complaining of such delay to apply to the Court and (if he were so advised) to move for liberty to bring an action. Had such a course been adopted the Court might, if it had seen occasion, have directed an action to be brought; but the defendant had no right

(a) *Phelps v. Prothero*, 16 C. B. 370.

(b) 2 Myl. & K. 620.

to resort himself to a Court of Law, pending the proceedings in the Master's office. I consider the form in which the
 * 730 * proceedings at law are sought to be restrained, whether by supplemental bill or otherwise, wholly immaterial, and that the plaintiff is entitled to have the action restrained by special injunction, upon the ground that it is an infringement of the rules of the Court to bring an action while the Court is working out a decree; and that where a proceeding is before the Court, and the Court has full power to do justice, a party ought not to resort to any other tribunal." The rule works no injustice, as this Court has jurisdiction to give damages in such a case. *Denton v. Stewart*, (a) *Greenaway v. Adams*, (b) *Nelson v. Bridges*. (c) At all events, the question as to the costs of the first action having been decided here, cannot be tried again at law.

They also referred to *Macnamara v. Arthur*, (d) *Maldon v. Fyson*, (e) *Hodges v. Earl of Lichfield*. (g)

Mr. Bacon and *Mr. T. H. Terrell*, for the defendant. — The plaintiffs have already, by pleading an equitable plea at law under the Common Law Procedure Act, submitted the very question which they raise by their present bill to a jurisdiction rendered by that Act of co-ordinate authority with this Court in the matter, and have failed. They cannot have the question tried over again. Moreover, there is no authority to the effect that adequate relief by way of damages can be obtained in a Court of Equity in such a case.

They referred to *Todd v. Gee*, (h) *Harrison v. Nettleship*, (i) * *Fennings v. Humphrey*, (k) *Watson v. Allcock*. (l)

Mr. Malins replied.

Judgment reserved.

(a) 1 Cox, 258; 17 Ves. 276.

(b) 12 Ves. 395.

(c) 2 Beav. 239.

(d) 1 B. & B. 349.

(e) 11 Q. B. 292.

(g) 1 Bing. N. C. 492.

(h) 17 Ves. 273.

(i) 2 Myl. & K. 423.

(k) 4 Beav. 1.

(l) 4 De G., M. & G. 242.

December 22.

THE LORD JUSTICE KNIGHT BRUCE. — In the causes now before us of *Phelps v. Prothero* and *Prothero v. Phelps*, I am satisfied that the nature and frame of the former suit, and the decree and the order on further directions of the 13th of March, 1849, obtained in it by Mr. Phelps as the plaintiff in that suit, were such as to give the Court of Chancery jurisdiction over him with respect to the action commenced by him against the late Mr. Prothero, and revived and now in prosecution against his executors, the plaintiffs in the second of the two suits now before us, — jurisdiction I mean, to restrain the action either wholly or partially, either upon terms or unconditionally, but of course a jurisdiction to be exercised according to a judicial discretion and not arbitrarily.¹

The sole object of this action was and is to recover against the late Mr. Prothero and his estate damages for a breach or breaches by him of the agreement between him and Mr. Phelps, of which the latter sought, and obtained in effect, the specific performance in his suit here now before us. How the matter would have stood if he had obtained no relief, if his bill had been dismissed, it has been unnecessary to consider, and I do not intimate an opinion.

* The next question is whether Mr. Phelps's action has * 732 been at law so met and so dealt with as to prevent this Court from interfering, at the instance of the defendant, in that action, in respect of it. And considering that the declaration against the late Mr. Prothero, who died in the year 1853, was in his lifetime successfully demurred to, and was not amended until more than a year had elapsed after his death, and considering the temptation held out to his executors by c. 125 of the statute of the seventeenth and eighteenth years of the Queen, I think that the manner in which Mr. Phelps's action has been met, and the time of filing the bill of the executors (which was in June last) furnish no answer or objection to that bill.

It is a different question whether the decision of the Court of Common Pleas, reported in 16 C. B. 370, precludes or bars the suit of the executors. My opinion, however, is, that it does not. The proposition that the executors had not, under the statute, an equitable defence available at law against the action of Mr. Phelps, is quite consistent with the proposition, that the executors had and

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 817, 2 ib. 1618.

have a right to come to this Court for relief, total or partial, conditional or unconditional, against it in consequence of the suit instituted here successfully by Mr. Phelps against the late Mr. Prothero for a performance of the agreement, the subject or groundwork of Mr. Phelps's action.

The executors, I think, contend for too much, when they insist, that it is at present clear, that their testator, the late Mr. Prothero, by breaking, as he did, that contract on his part, did not cause to Mr. Phelps any hitherto uncompensated damage beyond Mr. Phelps's expenses in the action against him and his expenses in

his suit in equity, which the taxed costs received by him * 733 from the late Mr. Prothero did not cover. For those expenses, as it appears to me, Mr. Phelps cannot sue, his costs at law of the action against him having been formerly asked and refused here. But otherwise I am not sure that his action is groundless, nor do I think, that, unconditionally, it should continue restrained. The matters, however, in respect of which he is entitled, if he is entitled at all, to recover damages, are, in my judgment, of a nature more fit in the circumstances of the case to be submitted to this Court, though for the purpose of a claim of damages, than to a jury.

I am, therefore, of opinion that, the executors not in any event desiring a jury, an inquiry should be made before the Vice-Chancellor, or his chief clerk, whether, besides the costs, charges, and expenses incurred by Mr. Phelps in the action against him and in his suit in equity he has sustained any and what amount of damage by reason or means of any breach or breaches by the late Mr. Prothero of the agreement of August, 1844, which was the subject of the bill in *Phelps v. Prothero* in this Court, and if so, when and under what circumstances, and whether such damage has been wholly, or to any and what extent, compensated, satisfied, or made good to Mr. Phelps, and when and under what circumstances. Further consideration should be reserved, and the injunction should be maintained until further order.

The Lord Justice TURNER, after stating the facts of the case, said: The first question is, whether the defendant was at all entitled to commence the action now sought to be restrained. I am of opinion that he was not. The defendant had originally the right to proceed, either at law, for breach of the agree-

ment, or in this Court, for * the specific performance of it. * 734 He adopted the latter remedy. I think that a plaintiff, who has legal rights, and comes to this Court for its aid, is bound to put his legal rights under the control of the Court, and that that principle reaches the present case. The plaintiff, therefore, having sued in equity for specific performance, was bound, in my opinion, to submit his claim for damages to the judgment of this Court, and was not entitled to proceed at law otherwise than by leave of this Court.

That it was competent to this Court to have ascertained the damages, I feel no doubt. It is the constant course of the Court, in cases between vendor and purchaser, upon a sufficient case being made for the purpose, to direct an inquiry as to the deterioration of the estate pending the contract, and in so doing the Court is in truth giving damages to the purchaser for the loss which he has sustained by the contract not having been literally performed. This Court, when it entertains jurisdiction, deals as far as it can with the whole case, and not with part of it only; and it is well settled by authority that a defendant cannot be allowed, without the leave of the Court, to proceed at law on the subject-matter of the suit, whilst proceedings in this Court are pending. *Frank v. Bassett*, (a) and *Bell v. O'Reilly*, (b) in which latter case Lord REDESDALE seems to have considered that the proceeding at law might be treated as a contempt.

This rule, I think, is as much applicable after decree as it is pending the suit, except of course in cases where the right to sue at law arises on instruments executed under the decree. It is, as I think, more especially applicable in cases where, as in the present, the decree * has reserved liberty to apply; and I * 735 think also, it is not less applicable to a plaintiff than to a defendant. If at the hearing of the suit instituted by this defendant he had stated that it was his intention to proceed at law, and the Court had permitted him to do so, it is by no means improbable that it would have dealt differently with the costs of the suit. It was urged, on the part of the defendant, that the damages for which he is suing at law, in part, at least, arose after the institution of the suit; and this, no doubt, is true, but it is unim-

(a) 2 Myl. & K. 618.

(b) 2 Sch. & Lef. 430.

portant, for the defendant had ample opportunity of bringing them under the consideration of the Court.

The next question is, whether the plaintiffs are precluded from relief in equity by what has passed at law. I am of opinion that they are not. I think that the 83d section of the Common Law Procedure Act does not apply to a case like the present. The enactment is, that the defendant in any cause in which, if judgment were obtained, he would be entitled to relief against such judgment upon equitable grounds, may plead the facts which would entitle him to such relief by way of defence, and the Courts may receive such defence by way of plea. The expression "equitable grounds," as I understand this enactment, means grounds depending upon the laws by which Courts of Equity are governed, and not upon the course and practice of those Courts; and the context seems to me to confirm this construction; for the enactment points to facts to be pleaded, giving title to the equitable relief; and it cannot surely be supposed, that the legislature could intend that the course and practice of Courts of Equity should be pleaded, and should become the subject of investigation in trials at law. This seems to have been the view taken of the enactment by Mr. Justice MAULE, and I concur in that * 736 view. Assuming this to be the correct * construction of the Act, the case against the plaintiffs, so far as this point is concerned, amounts to no more than that they have pleaded a bad plea at law, and this cannot, I think, defeat their title to relief in equity.

The remaining question is, whether this action should be permitted to proceed under the control of this Court, or whether this Court should take upon itself to investigate the question of damage to the defendant. In my opinion, it is the duty of this Court, in the first instance, at least, to make the investigation. I think it is for the most part undesirable that parties should be compelled to resort to another forum, and that it is more particularly so in the present case, in which the alleged damage is intimately connected with the proceedings instituted and carried on in this Court.

I concur, therefore, in the order proposed by my learned brother.

* M'INTOSH v. THE GREAT WESTERN RAILWAY * 737
COMPANY.

1855. December 17. Before the LORDS JUSTICES.

The deposition of a witness examined *de bene esse* when about to go abroad ordered, after the dismissal of the bill, to be published, for the purposes of another suit instituted against the same defendant, upon certain terms, and saving just exceptions.¹

THIS was an appeal from an order of Vice-Chancellor STUART directing the publication of depositions taken *de bene esse* in a former suit between the plaintiff and the principal defendants to the present suit.

The depositions in question had been taken on an *ex parte* application on the ground that the witness was going abroad, and saving all just exceptions. They had never been published in the suit in which they were taken, the bill in that suit having been dismissed.

Mr. Bacon and *Mr. Stevens*, for the defendants the Great Western Railway Company, who were the appellants. — These depositions could not have been published even in the cause in which they were taken, for they were taken under an order obtained *ex parte*, which was irregular. *Hope v. Hope*. (a) If, during the existence of the former suit, the plaintiff had moved for publication, we should have objected to the irregularity of the order, and moved to discharge it. It may be true that the witness is abroad or dead; but this is not sufficient to render his evidence admissible. If the deposition had been taken in the regular course it might possibly have been used in evidence in another cause between the same parties, for we then should have had an opportunity of cross-examination. In such cross-examination we should have put into the witness's hands certain letters of his, which we have in our possession, and which we cannot *now * 738 put in evidence, but which would have shown him to be a prejudiced witness. This, being an application to publish evidence,

(a) 3 Beav. 317.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 870, 871.

is made in a cause in which the evidence was not taken. That objection is a sufficient answer to the application.

Mr. Elmsley and *Mr. Hetherington*, for the plaintiff, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — Neither of us has, I believe, any doubt that these depositions must be published. All that the order complained of does, is to direct them to be published and used at the hearing, saving all just exceptions. I do not see how this can be objected to, except on one of the two grounds which I am about to mention. One is, that perhaps the forms of the Court require the motion to be entitled in both the causes. This, however, is mere matter of form, and if necessary the notice of motion may be amended in this respect.

The other ground is, that there has not been an opportunity of putting in evidence letters which the witness is alleged to have written showing him to be prejudiced against the defendants. The plaintiff must, I think, undertake that all letters proved to be in the handwriting of the witness should be admitted to be used at the hearing, in the same way as if the witness had proved them himself on cross-examination.

Neither of these objections was, as I understand, raised in the argument before the Vice-Chancellor. The company must, I think, pay the costs of this appeal.

The Lord Justice TURNER concurred.

1855. December 22. Before the LORDS JUSTICES.

After the expiration of eight days from the filing of the certificate of a sale under a decree, the Court refused to open the biddings on a mere advance of price, though considerable.¹

The eight days for applying to vary the certificate under the 51st Order of October 16, 1852, include vacations.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1288; *Howell v. Kightley*, 8 De G., M. & G. 325. As to the practice of opening biddings upon a mere advance of

THIS was the appeal of a purchaser under a decree from an order of Vice-Chancellor STUART opening the biddings.

The sale took place by auction on the 2d of August, 1855, and the appellant, Mr. W. Bartholomew, was declared the purchaser of Lot 12. On the 4th of August the certificate of the sale was made. On the 9th of August it was signed by the Vice-Chancellor and filed.

On the 18th of August the appellant wrote to the solicitors who had the conduct of the sale, to the effect that, assuming the certificate to be now binding, he had appointed a valuer of the timber, and he requested the abstracts might be forwarded.

On the 21st of August the abstracts were delivered and shortly afterwards the valuation of the timber was made, amounting to 994*l.* 11*s.* 3*d.* Objections and requisitions upon the abstracts were afterwards delivered, and replies returned.

On the 29th of October the appellant was served with a summons to attend at the Vice-Chancellor's chambers on the hearing of an application on the part of the respondent Mr. Curteis, that, upon his paying to the appellant all costs, charges, and expenses occasioned by the appellant's bidding for and being certified the purchaser of the premises comprised in Lot 12, and upon Mr. Curteis paying within fourteen days after the date of the order to be made thereon the sum of 230*l.* into the bank, to the credit of the cause, by way of deposit, the * premises comprised in Lot * 740 12 might be resold. Mr. Curteis had authorized an agent to bid for him at the sale at which the appellant had purchased, and without limit as to price; but the agent, after bidding several times, declared he would bid no longer, as the biddings had far exceeded the value of the property.

The reserved bidding was 1600*l.*, and the price at which the appellant had purchased was 2770*l.*

Mr. Speed in support of the appeal. — The certificate became, under the 15 and 16 Vict. c. 34, and the 1st Order of October 16th, 1852, absolute on the 16th of August, when eight clear days had elapsed after the time of filing it; *Bridger v. Penfold* (a) (for in this computation vacations must be included). In order to open the

price, see 2 Dan. Ch. Pr. (4th Am. ed.) 1285 *et seq.* and notes. This practice has been discontinued in England, by 30 & 31 Vict. c. 48, § 7.

(a) 1 K. & J. 28.

biddings, therefore, a special case must be made: *Morice v. The Bishop of Durham*; (a) and such a case as shall satisfy the Court, having regard to the observations of Lord ELDON in *White v. Wilson*. (b) Here no special circumstances appear in favour of the respondent, and that of his having bidden is adverse to him.

Mr. Malins and *Mr. W. D. Lewis* for the respondent *Mr. Curteis*. — Cases under the old practice do not now apply, the Court having under the new practice and particularly under the 59th Order of October 16th, 1852, a much wider discretion than it formerly had. The circumstance of *Mr. Curteis* having bid at the sale does not prevent the Court from opening the biddings on his application. *Tynedale v. Ware*, (c) *Thornhill v. Thornhill*, (d) *Lefroy v. Lefroy*. (e) As the certificate was signed in the long vacation, the respondent made as early an application as he could.

* 741 * *Mr. Cole*, for the plaintiffs.

Mr. Speed, in reply, referred to *M^r Cullock v. Colbatch*. (g)

THE LORD JUSTICE KNIGHT BRUCE. — In this case the sale took place early in August. The certificate finding the appellant the purchaser was filed on the 9th, and, in my opinion, it was incumbent on any person desiring to open the biddings to give notice of his intention on or before the 17th of August, unless any special circumstance could be shown excusing him from the ordinary rules of practice. Now, a large advance, though a requisite condition for opening the biddings, was not under the old practice sufficient to induce the Court to make an order to that effect, after the report had been absolutely confirmed.¹ The present applicant made a bidding at the sale by an agent, who had unlimited power to bid, and who ceased to bid when he thought that he had bidden enough, deliberately allowing another person to become the purchaser.

That *Mr. Curteis* did not bid in person but by an agent is not

(a) 11 Ves. 57.

(d) 2 J. & W. 347.

(b) 14 Ves. 153.

(e) 2 Russ. 606.

(c) Jac. 525.

(g) 3 Madd. 314.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1288; *Bridger v. Parfold*, 1 K. & J. 28; *Barlow v. Osborne*, 6 H. L. Cas. 556; S. C. *nom. Osborne v. Foreman*, 8 De G., M. & G. 122.

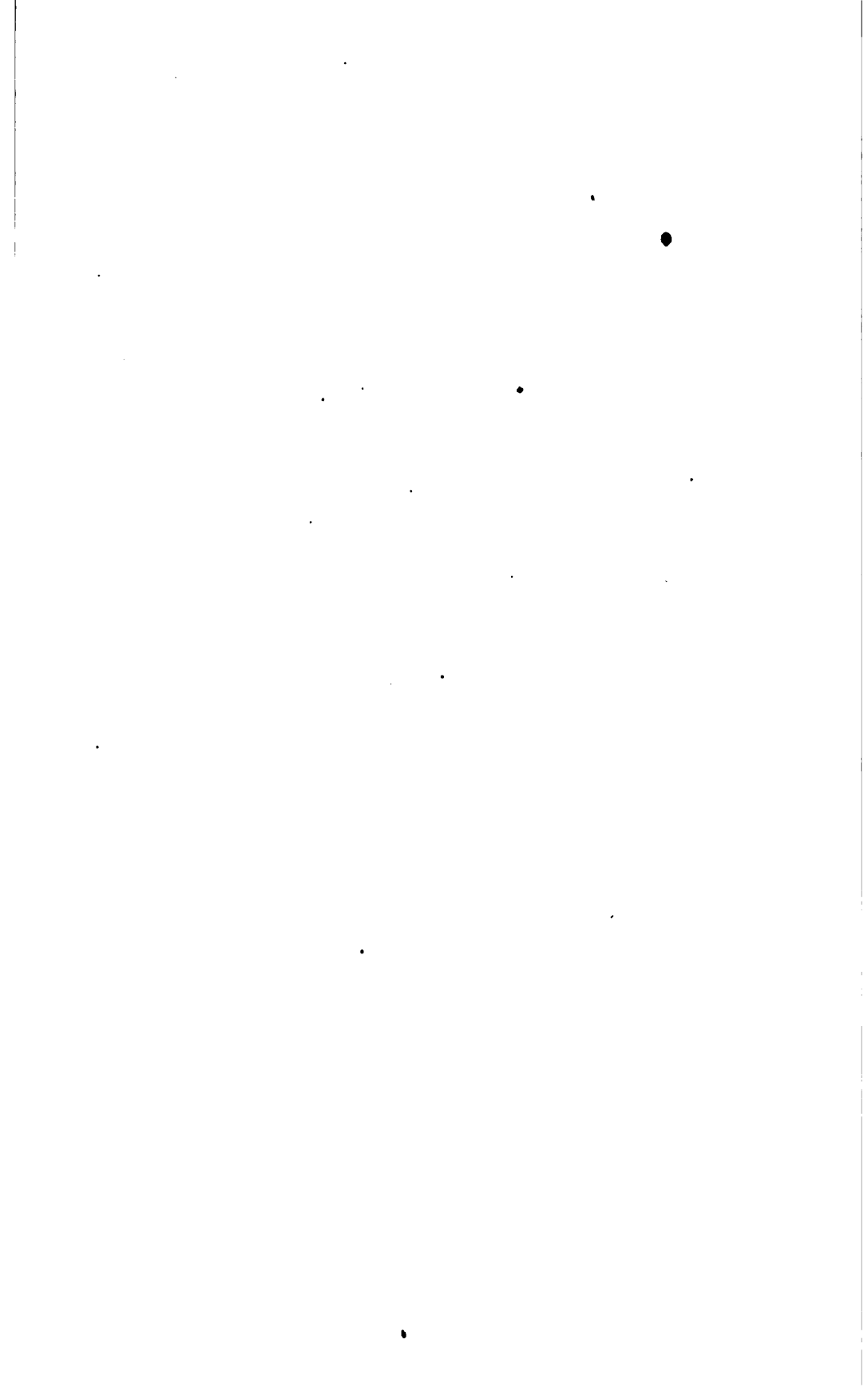
material, nor is it material that the best bidder did not purchase for himself. It is a common practice for persons to bid as agents only, and it does not appear that the agent in this case represented himself to be bidding as a principal. It is also immaterial that the certificate was filed in the vacation, for an application to open the biddings might have been made in the vacation. I think that it would be dangerous to the general practice of the Court to grant the application. The case, however, does not seem one for costs.

* THE LORD JUSTICE TURNER. — I am also of opinion that * 742 the order must be discharged. The certificate, I think, had become absolute.

The 34th section of the Act provides that, where "any certificate or report of the chief clerk shall have been signed and adopted by the Judge, the same shall be filed in like manner as reports are now filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied either at chambers or in open Court, according to the nature of the case, upon application by summons or motion, within such time as shall be prescribed in that behalf by any general order of the Lord Chancellor, and nothing herein contained shall prejudice or affect the power of the Court at any time to open any such certificate or report, upon the same or the like grounds as any report of a Master of the said Court which has been absolutely confirmed may now be opened."

The general order has fixed this time at eight days after the filing of the certificate, and there is nothing in the statute or in the orders to prevent the time from running in the vacation. The certificate having thus become absolute, I am of opinion that no case has been made justifying the Court in opening it under the concluding words of the 34th section. According to the old practice, no report, after having been absolutely confirmed, could have been opened on such grounds as those relied upon by the respondent.

It has been contended that a discretion is given to the Court by the 59th Order of October 16th, 1852, but I much doubt whether that order applies to a case like the present. Even if it does, I think that it would be a very dangerous exercise of such a discretion to accede to the present application.



AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ABATEMENT.

A testator by his will devised certain real estate to trustees in fee in trust out of the rents to pay an annuity to A. B. until he obtained twenty-five, when he was to be entitled to the possession of the estates, and an annuity of 400*l.* a year to C. D. for life, and an annuity of 150*l.* for the maintenance, and during the minority of an infant tenant in tail, and "without prejudice to the trusts aforesaid," and "to any jointure to be created under the power thereafter contained," to pay the surplus rent to the mother of A. B. until he should be entitled to the possession of the estates, and "subject to the trusts aforesaid," the trustees were to hold the estates in trust for A. B. for life, in remainder to his eldest son in tail, with power to A. B. to appoint a jointure to any wife, with the usual powers of distress and entry, to take effect immediately after his decease; A. B. having appointed the jointure, died, leaving his widow, who gave birth to a posthumous son, the infant tenant in tail. The income of the estates proving deficient: *Held*, that the annuity of 400*l.*, the jointure, and the annuity for the maintenance of the infant tenant in tail, must abate *pari passu*, but that the apportionment was not to be retrospective so as to affect the amount received by C. D. previously to the birth of the tenant in tail.

— *Coore v. Todd*, 520.

* ABROAD. See PRACTICE, 3.

* 744

ACCOUNTS. See RETROSPECTIVE ACT. SOLICITOR, 5.

ACCRUING SHARE. See WILL, 4.

ACKNOWLEDGMENT.

The acknowledgment of a deed by a married woman under the Fines and Recoveries Act need not be taken before enrollment of the deed.—*Ex parte Taverner*, 627.

See STATUTE OF LIMITATIONS.

ACT OF PARLIAMENT.

An Act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction. Therefore, in construing a gas company's Act, which, after requiring the consent of certain local commissioners to breaking up of the pavements, provided, that, where any consent was required and should be obtained by the company to break any pavement, to lay down pipes, or for any other purpose, which might be required under the Act, nothing in the Act contained should (after such consent obtained and after twenty-four hours' notice) prevent the company from breaking up the pavement for the purpose of laying down pipes, or for any other purpose which might be required under the Act: *Held*, that a construction "*reddendo singula singulis*" was not the correct one, and that the power to break the pavement was not to be confined to the particular purpose to which the consent had been expressly given. — *Dover Gas Light Company v. The Mayor, &c., of Dover*, 545.

See PUBLIC COMPANY. RETROSPECTIVE ACT.

ADMINISTRATION. See CHARITY.

ADMINISTRATION SUIT. See PRACTICE, 7.

ADMISSION OF ASSETS. See ASSETS, 1.

ADOPTION. See DECREE.

AGENT. See SOLICITOR, 4.

AGREEMENT. See ARBITRATION. POWER OF SALE. SPECIFIC PERFORMANCE.

ANNUITY.

A testator gave his real and personal estate in trust, to invest thereout such a sum as that the dividends or interest thereof should realize the clear annual income of 200*l.*, and pay it to his wife during widowhood, and to stand possessed of the principal, in trust for the *testator's brothers and sister; and he gave the residue of his estate, after raising the money sufficient to realize the annuity for his wife, to his brothers and sister. On the assets proving insufficient to provide a capital sum which would yield 200*l.* per annum: *Held*, by Lord Justice KNIGHT BRUCE, confirming the decision of the Master of the Rolls, *dissentiente* Lord Justice TURNER, that the widow was entitled to have the amount paid in full out of capital. — *Baker v. Baker*, 681.

ANTICIPATION. See HUSBAND AND WIFE.

APPEAL. See MARRIED WOMAN, 2.

APPLICATION OF MONEY. See PARTNERSHIP.

APPOINTMENT. See POWER.

APPORTIONMENT. See ABATEMENT.

ARBITRATION.

By a submission to arbitration between patentees, all matters in difference between the parties relating to gutta-percha were referred to the decision of the arbitrator, who was empowered to set aside certain deeds which had been executed by the parties, if he thought fit, and to order assignments to be executed for vesting in trustees all patents and applications for patents relating to gutta-percha taken out or made, or to be taken out thereafter by the parties, or any of them.

By the award the arbitrator, "if and so far as he had power and jurisdiction," set aside altogether certain deeds which he specified, but if he had not "power or jurisdiction to set the same or any or either of them aside," or to award any other matter in that his award contained, he declared that the rest of his award was yet to stand. He also by the award decided upon the rights of the parties under the deeds executed by them, and not thereby set aside, and directed that neither of the parties should grant any license of or work any of the patents save under a license from the trustees to be appointed under the award, which required the parties to nominate their respective trustees within fourteen days, and to signify their election to take licenses within two calendar months from the date of the award. The award also directed, that the parties should covenant with one another that they and their licensees should assign to the trustees any assignable interest which they might respectively have in any patents relating to gutta-percha. The submission was made a rule of a common-law Court. In a suit for a specific performance of the award: *Held*, —

1. That the award was bad for * want of finality and excess of authority. * 746
2. That, if it had not been so, a submission which would warrant such an award was not sufficiently reasonable to be enforced by way of specific performance.
3. That, although the defendant had to some extent acted on the award, by nominating trustees and signifying an election to take licenses, there had not been such an acquiescence in the award as to justify the Court in enforcing a specific performance of it against him on that ground, no one appearing to have been misled by his acts.
4. That many, if not all, of the principles applicable to suits for the specific performance of agreements, apply to those for the specific performance of a submission to arbitration, and that therefore the above objections were sufficient answer to such a suit.
5. That, ordinarily, this Court will not enforce specific performance of part of an agreement, nor consequently of part of an award. — *Nickels v. Hancock*, 300.

ASSETS.

1. A testator directed that certain legacies should remain at interest in his business. His executor, who was his brother and partner, credited in his books the legatees, who were the executor's sons and had access to his books, with the amounts of the legacies, and with interest upon them, but in a deed between the parties the accounts were recited to be unsettled. He returned to the stamp office the estimated value of the testator's estate, at an amount more than sufficient for payment of the legacies, and paid duty upon them and upon a residue beyond. *Held*, that, in the circumstances of the case, those acts did not amount to a conclusive admission of assets.

One of the legatees had on his marriage assigned a part of his legacy to the trustees of his settlement, covenanting to pay the amount by in-

stalments. It appeared, on the evidence, that the marriage was contracted and the settlement made on the faith of representations by the executor that the legacy was substantial and safe, and would be paid, though at a future time: *Held*, that the estate of the executor thereby became indebted for the whole amount. — *Hutton v. Rossiter*, 9.

2. Under a covenant that if the covenantor's wife survived him, he, his heirs, executors, or administrators, would pay her a specified annuity for life, and that, for better securing it, he or his heirs would grant and secure the same out of a sufficient part of the real estates devised to him by a particular will: *Held*, that the estates were only secondarily liable, and that the personal estate of the covenantor was the primary fund. — *Field v. Brown*, 691.

See ABATEMENT. CHARITY.

* 747 * ASSIGNEE. See INSOLVENT.

ASSOCIATION. See FRIENDLY SOCIETY.

ATTACHMENT. See PRACTICE, 3.

AUTHORITY. See SOLICITOR, 4.

AWARD. See ARBITRATION.

BANKING COMPANY. See BREACH OF TRUST, 2.

BANKRUPT.

Held, by the commissioner, that an incorporated canal company, whose profits arose from tolls, was, as a "Commercial Company," or a company associated for commercial purposes, liable to become bankrupt under the 7 & 8 Vict. c. 111. On appeal judgment was reserved and the case compromised. — *Ex parte Croysdill*, 199, n.

See DOMICILE, WILL, 7.

BARON AND FEME. See ACKNOWLEDGMENT. DOWER ACT. HUSBAND AND WIFE. INFANT. MARRIED WOMAN. WILL, 3.

BIDDINGS. See OPENING BIDDINGS.

BILL. See PRACTICE, 1, 2.

BOOKS. See RETROSPECTIVE ACT.

BREACH OF TRUST.

1. Under a trust to lend trust-money to one of the trustees on his personal security until the trustees should deem it advantageous to invest the money in the funds: *Held*, that the omission to call in the money, which had been accordingly lent to the trustee, and its consequent loss, did not, in the absence of any proof of misconduct on the part of his co-trustee, create any liability on the part of such co-trustee.

Held, also, that as payment of the debt was only enforceable in equity, and the *cestui que trust* might have enforced it himself, this circumstance was an answer to a suit by him seeking to render the co-trustee personally liable. — *Paddon v. Richardson*, 563.

2. If a lender of money to an executor has, at time of the loan and before parting with the money, notice that the executor in borrowing commits a breach of trust and intends to misapply the money, he acquires no better title against the estate than the executor himself.

Where a local agent of a banking company in that character advances money of the company by * way of loan, and the borrower, to the agent's knowledge, is obtaining the money for the sole purpose of misapplying it, the company acquires no better title than the agent would have had had the case been his own, or than the borrower. * 748

An executor borrowed money from a banking company of which he was the local agent, for the purpose of making a further advance to a mortgagor of a ship, on the security of which the testatrix had lent money, on the pretence that such further advance was made to pay off a prior charge, but really to assist the mortgagor, and the security proved ultimately wholly insufficient: *Held*, that the company had no claim upon the testatrix's assets, and that a mortgage of the ship made by the executor to the company to secure their advance was invalid.—*Collinson v. Lister*, 684.

3. A., one of three sureties who had become bound to the extent of 2000*l.* to a corporation for the due accounting of the office of its treasurer by B., received formal notice from the corporation that B. was a defaulter, and on the next day took from B. a deposit note of a bank for 2300*l.*, which had been placed in the bank by B. one month previously in the name of his daughter. On a bill filed by the corporation against B., who had absconded, and the three sureties to make good the amount found due by B. *ultra* the 2300*l.*: *Held*, establishing the liability of the trustees, that the circumstances under which A. received the 2300*l.* were such as ought to have induced him to make inquiry, and that, having neglected to do so, he was bound to restore this amount with interest after the rate of 5*l.* per cent.

One of the sureties having died after the claims of the plaintiffs against them had been established, and after a sum of money had been paid by them into Court: *Held*, that, for the purposes of the suit, a representative of the deceased surety was a necessary party; though the Court refused to declare in the suit as constituted the liabilities of the sureties *inter se*.—*Mayor, &c., of Berwick-upon-Tweed v. Murray*, 497.

See DOMICILE. TRUST. WILL, 9.

BUILDING ACTS.

The trustees of a benefit building society, acting on the rules of the society, declared a bonus of 23*l.* per share, calculating the amount in forgetfulness as they alleged of the decision in *Fleming v. Self*, 3 De G., M. & G. 997, and therefore on the assumption that advanced members, that is members who had borrowed money of and executed mortgages to the society, would not be entitled on redeeming those mortgages to any thing on account of bonuses. A. B., an advanced member, then * gave notice of his desire to redeem: *Held*, that he was * 749 entitled to have credit for the bonus of 23*l.* on each of his shares, and that the Court would not interfere to relieve the society from the consequences of the act of the trustees.—*Archer v. Harrison*, 404.

CALL. See WINDING-UP ACTS.

CANAL COMPANY. See BANKRUPT.

CERTAINTY. See SPECIFIC PERFORMANCE, 3.

CHANCERY AMENDMENT ACT. See RETROSPECTIVE ACT.

CHARGE. See ABATEMENT. ASSETS, 2. INCUMBRANCE.

CHARITY.

A testatrix by her will having given certain specific and pecuniary bequests to her general residuary legatee, and having also given various charitable legacies, directed the latter to be paid in precedence of the other pecuniary legacies out of such part of her personal property not specifically bequeathed as was by law applicable for charitable purposes. The pure personalty being insufficient to pay all the charitable legacies: *Held*, that, in the administration of the testatrix's estate, the debts, and the funeral and testamentary expenses and costs of this suit were, in the first place, payable ratably out of the pure personalty and out of the personalty savouring of realty, and that after such payment the charitable legacies were to be paid out of the balance of the pure personalty, in precedence of the other legacies. — *Tempest v. Tempest*, 470.

See DEED.

COMMERCIAL COMPANY. See BANKRUPT.

COMMON LAW PROCEDURE ACT. See DAMAGES.

COMPANY. See BANKRUPT. PUBLIC COMPANY. WINDING-UP ACTS, 2.

CONDITIONS OF SALE. See SPECIFIC PERFORMANCE, 1.

CONFLICT OF LAW. See DOMICILE.

CONSIGNEE. See LIEN, 1.

CONSTRUCTION. See ABATEMENT. ACT OF PARLIAMENT. ANNUITY. ASSETS, 1. DOMICILE. HUSBAND AND WIFE. *PARTNERSHIP. POWER. WILL, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11.

CONSTRUCTION OF ACT OF PARLIAMENT. See ACT OF PARLIAMENT. PUBLIC COMPANY. RETROSPECTIVE ACT.

CONSTRUCTIVE TRUST. See BREACH OF TRUST, 2.

CONTEMPT. See INFANT. MARRIED WOMAN, 1.

CONTRIBUTORY. See WINDING-UP ACTS, 2.

CONVERSION. See TRUST. WILL, 9.

COSTS. See DECREE. FRIENDLY SOCIETY. INCUMBRANCE. LIEN, 2.

CORPORATION. See BANKRUPT.

CORPUS. See ANNUITY.

CO-TRUSTEE. See BREACH OF TRUST, 1.

COVENANT. See DEED. PERPETUITY. WINDING-UP ACTS, 2.

CREDITORS. See WINDING-UP ACTS, 1.

DAMAGES.

A plaintiff who has legal rights in a matter on which he comes to this Court for its aid is bound to put those legal rights under its control, and cannot proceed on them at law without its leave.

In a case decided before the 21 & 22 Vict. c. 27 came into operation: *Held*, that the Court has jurisdiction to award damages for the want of a

literal performance of a contract of which it directs the specific performance, and will in general do so rather than compel the parties to resort to another forum.

Where a defendant to an action pleaded unsuccessfully an equitable plea, grounded not on equitable principles, but on the course and practice of a Court of Equity: *Held*, that he was not precluded by the decision at law from filing a bill on the same grounds for an injunction to restrain proceedings in the action. — *Prothero v. Phelps*, 722.

See INJUNCTION.

DEBENTURES. See PUBLIC COMPANY.

DEBTOR AND CREDITOR. See WILL, 7.

DECREE.

Cestuis que trustent under a will instituted a suit to have the trusts

* carried into effect and to set aside a mortgage of a part of the * 751 trust estate made by the trustees. By the terms of the mortgage the mortgagees were not entitled to take possession except upon a prescribed notice. Before this notice had been given the plaintiff had obtained an order for a receiver, and also an order to take proceedings with respect to a claim adverse to the interests of all the parties to the suit. Afterwards a decree was made in the suit, establishing the validity of the mortgage and directing a sale, in which all parties were ordered to join. The mortgagees neither consented to nor opposed the interlocutory order being made, nor did they at the hearing ask for a dismissal of the bill as against themselves, or oppose the insertion of the direction for a sale. They afterwards applied to have the receiver discharged and to be let into possession, and gave the notice prescribed by the mortgage. On their application being refused, they appealed from the refusal, and at the same time from so much of the decree as rendered it obligatory on them to concur in the sale.

Held, that they had not adopted the proceedings in the suit, but were entitled to priority over the costs of it and of the action, and also to have the receiver discharged and the decree varied so far as it bound them to join in the sale.

Held, also (the testator's estate in the subject of the security being equitable), that the Court might direct possession to be delivered to the mortgagees. — *Langton v. Langton*, 29.

See PRACTICE, 4.

DECREE, SALE UNDER. See OPENING BIDDINGS.

DEED.

An instrument under seal contained a covenant with trustees that the covenantor in his lifetime or his executors within twelve months after his decease would invest 60,000*l.* in the names of trustees upon charitable trusts. It was executed by the covenantor, but was not communicated to the trustees: *Held*, —

1. That it was a deed whether it was also testamentary or not.
2. That it was not invalid as infringing the provisions of the Statute of Mortmain. — *Alexander v. Brame*, 525.

See LIEN, 2, 3. PARTNERSHIP. WINDING-UP ACTS, 2.

DEPOSITIONS. See EVIDENCE.

DISMISSAL. See PRACTICE, 2.

DOCUMENTS. See LIEN, 3.

DOMICILE.

*752 On the 2d August, 1826, A. D., a domiciled Scotchman, married *the plaintiff (then H. G. I., a domiciled Englishwoman), they having two days previously both executed a settlement in writing in the Scotch form, whereby A. D. bound himself, his heirs, executors, and successors, to pay, after his decease, an annuity to the said H. G. I. his promised spouse, for her life, and certain portions for the children of the marriage, to be divisible amongst them in manner therein mentioned. The settlement then provided as follows: "For which causes and on the other part the said H. G. I. hereby assigns over to and in favour of herself and the said A. D., her promised spouse, in conjunct fee and life-rent, and the child or children that shall be procreated of the said intended marriage, divisible as aforesaid, whom failing, the said H. G. I., her heirs and assigns whomsoever, in fee, all estate, funds and effects, heritable and movable, real and personal, presently belonging, or due and abdebt to her, or that may be acquired by her during the subsistence of the said intended marriage." Lastly, it was provided thereby, that the provisions before written in favour of the said H. G. I. and the children of the marriage should be full satisfaction from the said A. D. of all legal claim competent to them upon his decease. Upon the death, in 1836, of her father, a domiciled Englishman, the plaintiff became entitled under his will to a reversionary interest, expectant on the death of her mother, in one-fourth part of his personal estate. In 1841, A. D. and the plaintiff changed their domicile, which had continued Scotch since the marriage, to England. In 1842 the plaintiff's mother died, and in the interval between that event and the bankruptcy of A. D., in 1848, S., the surviving executor and trustee of the testator's will, paid, in various instalments, nearly the whole of the funds bequeathed by the will to the plaintiff to A. D., upon the joint receipt of himself and plaintiff: *Held*, that the marriage contract was to be construed by the law of Scotland, or with reference to that law; and that, when so construed, its effect was to give a life-interest to A. D. in the property coming to the plaintiff under her father's will, remainder to her absolutely, expectant upon A. D.'s decease, with a *spes successionis* only to the children of the marriage: and that, during the joint lives of the husband and wife, the *corpus* of the property was payable to the husband on their joint receipt.

Held, also, that the plaintiff was not entitled, as against the assignees in bankruptcy of her husband, to have his future income under the settlement impounded to make good her contingent annuity thereunder.

One of the instalments above mentioned was paid partly in cash and partly
 *753 by setting off a debt acknowledged by A. D. to be owing *by him to the testator's estate: *Held*, that the receipt, which was for the cash only, under the description of "balance due to wife," was valid for the whole amount. — *Duncan v. Cannan*, 77.

DOWER ACT.

In a purchase deed of earlier date than the Dower Act, the usual limitations to bar dower were expressed to be to the intent that the then present or any future wife of the purchaser might not be entitled to dower: *Held*, by Lord Justice KNIGHT BRUCE, *dubitante* Lord Justice TURNER, that this was not a sufficient declaration to exclude the dower of a widow to whom the purchaser was married after the passing of the Act. — *Fry v. Noble*, 687.

ENCLOSURE ACT.

Held, by Lord Justice TURNER, confirming a decision of the Master of the Rolls, and *semble*, *per* Lord Justice KNIGHT BRUCE, that under the General Enclosure Act, 8 & 9 Vict. c. 118, gavelkind land may be exchanged for lands held in common socage.

But *held*, by Lord Justice KNIGHT BRUCE, that, however this might be, an experienced solicitor purchasing subject to a condition of sale stating that the property which was in Kent was in the course of being exchanged under the Act for lands in Middlesex, and that the title would be that to the Middlesex lands, could not successfully resist a specific performance on the ground of a doubt as to the construction of the Act of Parliament. — *Minet v. Leman*, 340.

ENROLMENT. See PRACTICE, 4.

EQUITABLE PLEA. See DAMAGES.

ESTATE PUR AUTRE VIE.

A testator who was entitled to the equity of redemption in certain freehold premises subject to a mortgage in fee devised the premises to J. P. and another as trustees, on trust in the first place out of the rents to pay off the mortgage, and he then gave 10l. a year out of the rents in the events which happened to E. P. and the remainder of the rents to J. P. and T. M. P. equally, and after the death of E. P. he devised certain parts of the premises to J. P. and the heirs of his body. T. M. P. died in the lifetime of E. P.; J. P. then joined in suffering a recovery for the purpose of barring the estate tail, but neither E. P. nor the next of kin of T. M. P. joined in making the tenant to the *præcipe*; *Held*, that the concurrence of E. P. was not necessary, but that the concurrence of the next of kin of T. M. P. was necessary, and that the recovery was for want of such concurrence invalid as to one moiety of the premises.

The eldest son and heir of T. M. P. was in possession of the rents of all the devised premises and joined in respect of certain parts of them, of which he was himself tenant in tail, in making the tenant to the *præcipe*. The Court refused, in the absence of any other circumstances tending to prove it, to presume a surrender to him of T. M. P.'s estate *pur autre vie*, or to regard him as having a title to it by general occupancy.

Held, that there could be no general occupancy whether the estate *pur autre vie* was regarded as legal or equitable; and that the person beneficially

entitled, and not the executor or administrator of T. M. P., was the proper person to concur in making the tenant to the *præcipe*.

- * 754 * The title of the plaintiff, against which in this case the recovery was set up, accrued in 1837; the plaintiff brought an ejectment in 1852, but was forced to abandon it and to proceed in equity: he filed his bill in 1855: *Held*, that he was not barred of his title to relief by lapse of time, and in particular that the 23d section of the Act 3 & 4 Will. 4, c. 27 did not apply to the case.

The account of rents and profits of those portions of the property to which the plaintiff was declared entitled was directed from 1852, the time when the plaintiff first made an adverse claim by commencing the ejectment. — *Penny v. Allen*, 409.

ESTATE TAIL. See ESTATE PUR AUTRE VIE. LUNATIC.

EVIDENCE.

The deposition of a witness examined *de bene esse* when about to go abroad, ordered, after the dismissal of the bill, to be published, for the purposes of another suit instituted by the same plaintiff against the same defendant and another, upon certain terms and saving just exceptions. — *M'Intosh v. The Great Western Railway Company*, 737.

See PRACTICE, 6. RETROSPECTIVE ACT. SOLICITOR, 5.

EXCHANGE. See ENCLOSURE ACT.

EXECUTOR. See ASSETS, 1. BREACH OF TRUST, 2. LIEN, 2. SPECIFIC PERFORMANCE, 2.

EXPULSION. See FRIENDLY SOCIETY.

FAMILY SETTLEMENT. See PARENT AND CHILD.

FEME COVERT. See ACKNOWLEDGMENT. DOWER ACT. HUSBAND AND WIFE. INFANT. MARRIED WOMAN. WILL, 3.

FINES AND RECOVERIES ACT. See ACKNOWLEDGMENT.

FOREIGN LAW. See DOMICILE.

FORFEITURE. See WILL, 3.

FRAUD. See PARENT AND CHILD. WINDING-UP ACTS, 2.

FRIENDLY SOCIETY.

A district Odd Fellows society, after expelling a lodge of the society for non-payment of subscriptions and fines, was registered as a friendly society pursuant to the 13 * & 14 Vict. c. 115, under a name which, upon an objection of the certifying barrister, was altered from the original name. Some deposit notes of a banker's with whom a portion of the subscriptions were deposited, remained in the hands of the grand master of the expelled lodge, and were demanded from him by the trustees of the registered society: *Held*, that, whether the expulsion of the lodge had been proper or not, he was bound to deliver up the notes to the trustees, and he was ordered to pay the costs of a suit instituted by the trustees against him for their recovery. — *Yeates v. Roberts*, 227.

GAS COMPANY. See ACT OF PARLIAMENT. INJUNCTION.

GAVELKIND. See ENCLOSURE ACT.

HUSBAND AND WIFE.

Property was devised in trust for the testator's daughter and her assigns for her life, and to permit her to receive the income for her life for her separate use, with a direction that her receipts alone, or of some person or persons authorized by her to receive any payment of the income, after such payment should have become due, should alone, notwithstanding her marriage, be good discharges: *Held*, that she was restrained from anticipation. — *Baker v. Bradley*, 597.

See ACKNOWLEDGMENT. DOMICILE. DOWER ACT. INFANT. MARRIED WOMAN. WILL, 3.

INCUMBRANCE.

1. A tenant for life in possession of settled estates, with power to charge them with a principal sum and interest for his own benefit, * exercised the power and mortgaged the principal and interest * 756 thus charged, together with property of his own, for a larger amount than that of the charge, and kept down the interest on the whole mortgage moneys. The rents and profits of the settled estates were insufficient to pay the interest of the sum charged under the power: *Held*, after the death of the tenant for life, that his mortgagees were entitled to a charge on the inheritance for the deficiency. *Held*, also, that in taking the account of the rents and profits received by him, they ought not, without special grounds, to be charged with what he might have received but for wilful default. — *Lord Kensington v. Bouverie*, 134.

2. Policy holders, whose claims for payment were disputed by the insurance company, deposited the policy as a security. The depositors brought an action in the name of the depositors against the company, and, pending the action, sub-mortgaged the policy with other securities. Afterwards the depositors gave notice to the sub-mortgagees to hold at the disposal of a bank any "balances" which might be due from the sub-mortgagee to the depositors, and the bank at the same time wrote a letter to the sub-mortgagee, who sent an answer, and both the letter and the answer referred to the policy moneys as being part of the balances mentioned in the notice: *Held*, that the notice created a valid security on the insurance money in favour of the bank, being, with the letters, sufficiently definite, and the pendency of the action not creating any objection on the ground of maintenance.

The attorneys acting in the prosecution of the action requested the bank, if interested in the result of the pending proceedings, to see that funds were supplied for their prosecution, stating, at the same time, that similar applications had been ineffectually made to the depositors. The bank took no notice of the application, and afterwards a purchaser of the equity of redemption supplied the requisite funds by means of which the insurance money was recovered: *Held*, by the Lord Justice TURNER, confirming the decision below, *dissentiente* Lord Justice

KNIGHT BRUCE, that the bank had not lost their priority over the purchaser, and that in order to have produced this result the bank ought to have been apprised of the purchase, and of the purchaser's advances.

Held, by both the Lords Justices, that the purchaser was entitled to be repaid all the sums which he had expended in the action, and to be paid his costs of a suit instituted by the bank disputing his title to such repayment.

After an award in the action, the insurance company received notice of an assignment by the plaintiffs of all their property, together with a demand by the assignees * for payment of the money recovered in the action. *Semble*, that they were not entitled to file a bill of interpleader, as they might safely have paid the money to the plaintiff's attorneys. — *Myers v. The United Guarantee and Life Assurance Company*, 112.

See SHIP.

INFANT.

The mere fact of marriage with a female ward of Court, without the Court's consent, *held*, to confer upon the Court a jurisdiction to decline, during the joint lives of the husband and wife; to part with a fund in its own power and custody belonging to the ward, even upon the application of the husband and wife upon the consent of the wife in Court, until such settlement should have been made thereof as should appear advisable and proper under the circumstances of the case.

Whether in such a case it would be in the power of the Court or correct to enforce a settlement against the wishes both of the wife and husband, *quære*. — *Martin v. Foster*, 98.

See LIEN, 3. MARRIED WOMAN, 1.

INFLUENCE. See PARENT AND CHILD.

INJUNCTION.

The plaintiff, a market gardener, whose premises adjoined those of a gas company, brought an action against the company for the injury done to his crops, by reason of the noxious matter issuing from the company's works. During the trial of the action the Judge suggested a reference to an arbitrator, who was to determine as to the injury, and as to "what should be done," between the parties. The reference having taken place, the arbitrator made his award in respect of the damage sustained up to the date of the award, and no evidence having been adduced before him as to prospective damage, a verdict was entered up for the sum awarded. The company subsequently increased their works: *Held*, that, on a bill filed by the plaintiff, he was entitled to a perpetual injunction to restrain the further manufacture of the gas in a manner injurious to his crops, the award of the arbitrator being, under the circumstances, equivalent to the verdict of a jury.

The 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) has reference to cases where a party is injuriously affected by reason of acts authorized to be done by a public company, in pursuance of the provisions of their private Act, and is inapplicable to cases where the

injury complained of may (as in the present case under the 29th section of the Gas Clauses Act, 10 & 11 Vict. c. 15) be compensated by recourse to an action at law for damages. — *Broadbent v. The Imperial Gas Company*, 436.

* **INSOLVENT.**

* 758

Held, by Lord Justice TURNER, *dubitante* Lord Justice KNIGHT BRUCE, that, although the property to which a debtor was equitably entitled at the time of his taking the benefit of the Act for the Relief of Insolvent Debtors may far exceed the amount of the debts payable under the insolvency, neither he nor a purchaser from him can intercept the title of the assignee under the insolvency to recover the surplus without showing that the property will be in danger if the assignee be permitted to receive it, or that there is some impediment to an application to the Insolvent Court to remove the assignee, if such is the case.

It not appearing clear to Lord Justice KNIGHT BRUCE, in the case before the Court, that there was a net surplus, *held*, by both their Lordships, reversing a decision of a Vice-Chancellor, that no interference with the title of the assignee ought to have taken place. — *Dyson v. Hornby*, 1.

INSURANCE COMPANY. See INCUMBRANCE, 2.

INTEREST. See BREACH OF TRUST, 3.

INTERPLEADER. See INCUMBRANCE, 2.

INVESTMENT. See TRUST.

ISSUE. See SOLICITOR, 5.

JOINTURE. See ABATEMENT.

JURISDICTION. See DAMAGES. **INFANT.** LANCASTER, DUCHY OF. PRACTICE, 3. **USURY.**

LACHES. See ESTATE PUR AUTRE VIE.

LANCASTER, DUCHY OF.

Order made under the Duchy of Lancaster Court of Appeal Act (17 & 18 Vict. c. 82), authorizing service of a claim on a defendant residing out of the jurisdiction of the Duchy Court. — *Waltham v. Goodyear*, 76.

LANDS CLAUSES CONSOLIDATION ACT. See INJUNCTION.

LEASE. See PERPETUITY.

LEGACY. See ASSETS, 1. **CHARITY.** WILL, 6, 10, 11.

* **LICENSE.** See ACT OF PARLIAMENT.

* 759

LIEN.

1. West India estates were devised upon trust for sale and distribution of the proceeds among the testator's children absolutely. In a suit for the administration of the trusts consignees were appointed, and pending the suit settlements were made of the children's shares, by which interests for life and in reversion were limited. In making payments which had been sanctioned by the Court, the consignees became in advance to

the trust estate: *Held*, that these advances were a charge upon the corpus of the trust estate. — *Morrison v. Morrison*, 214.

2. The solicitor of an executrix had in that character title-deeds of the testator's leasehold property. He acted for the executrix in a suit instituted against her by *cestuis que trustent* under the will. On her death an administratrix *de bonis non* of the testator applied for the deeds to the solicitor, and, on his refusal to give them up without being paid his costs, instituted a suit against him to have them delivered up: *Held*, that unless the estate of the executrix was indebted to that of the testator, her estate was entitled to a lien on the deeds for her costs, and that the solicitor had a lien to that extent. On the administratrix suggesting that the testatrix's estate was so indebted, the suit for delivery of the deeds was ordered to stand over until proceedings had been taken in the other suit to try that question. — *Turner v. Letts*, 243.
3. Where an infant plaintiff on coming of age repudiated the suit, *held*, that a defendant who had brought deeds into Court was entitled to have them returned, and that the solicitor of the next friend of the infant had no lien on them for his costs, although the defendant had by his answer admitted the infant's title to the estate to which the deeds related. — *Dunn v. Dunn*, 25.

See INCUMBRANCE, 2. SOLICITOR, 2, 3.

LIFE-ESTATE. See ESTATE PUR AUTRE VIE.

LIMITATIONS. See STATUTE OF LIMITATIONS.

LIMITATIONS, STATUTE OF. See ESTATE PUR AUTRE VIE.

LUNATIC.

Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding, but this doctrine is inapplicable to a case where the question is whether the deed of a lunatic altering the provisions of a settlement is valid. A lunatic tenant in tail of copyholds having executed powers of attorney authorizing her attorney first to procure her admission as tenant in tail in the several manors of the copyholds in question; and, secondly, to surrender them after admission and take a readmission in fee: *Held*, that the transaction was invalid, and that the estate tail was not barred; though at the instance of a creditor disputing the lunacy, an issue was directed as to whether the lunatic was, at the time of her executing the powers of attorney, of sound mind. — *Elliot v. Ince*, 475.

MARRIAGE SETTLEMENT. See DOMICILE.

MARRIED WOMAN.

1. Where a ward of Court married without consent, and after she attained her majority executed, by the direction of the Court, a settlement of real estate to which she was equitably entitled, but did not acknowledge the deed according to the Fines and Recoveries Act, *held*, that her heir was not bound. — *Field v. Moore*, 691.

2. Leave given to a married woman to appeal by a next friend, who was a co-defendant and respondent. — *Elliot v. Ince*, 475.
- See ACKNOWLEDGMENT. DOWER ACT. HUSBAND AND WIFE. INFANT. WILL, 3.
- MASTER. See USURY.
- MISTAKE. See SPECIFIC PERFORMANCE, 2.
- MONEY. See WILL, 10.
- MORTGAGE. See DECREE. ESTATE PUR AUTRE VIE. INCUMBRANCE, 1. PARTNERSHIP. POWER OF SALE. SHIP. SOLICITOR, 2, 4. USURY. WILL, 6, 9.
- MORTMAIN. See CHARITY. DEED.
- NEXT FRIEND. See LIEN, 3. MARRIED WOMAN, 2.
- NIECES. See WILL, 11.
- NOTICE. See BREACH OF TRUST, 2. INCUMBRANCE, 2. PARTNERSHIP. PRACTICE, 5.
- NUISANCE. See ACT OF PARLIAMENT. INJUNCTION.

* OCCUPANT. See ESTATE PUR AUTRE VIE.

* 761

ODD FELLOWS. See FRIENDLY SOCIETY.

OPENING BIDDINGS.

After the expiration of eight days from the filing of the certificate of sale under a decree, the Court refused to open the biddings on a mere advance of price, though considerable.

The eight days for applying to vary the certificate include vacations. — *Ware v. Watson*, 739.

PARENT AND CHILD.

Transactions between parent and child, if in the nature of a settlement of property or rights, are regarded with favour, and not with minute regard to the consideration; but if in the nature of bounty from the child soon after he attains majority, are to be viewed with jealousy, and as the subject of interposition of the Court to guard against undue influence.

A mortgage was made of property by father and son, immediately after the latter had attained his majority, to secure debts due from the father, to some extent incurred in improvements on the property and in maintaining and educating the son. The mother joined in the security, for the purpose of subjecting to it her separate estate, which she was, however, by a clause not recited or noticed in the mortgage, restrained from anticipating. The son had no separate advice on the occasion. *Held*, that the mortgage was not capable of being supported as a family arrangement, but was void as obtained by undue influence.

An agreement held impeachable under a bill not directly stating it.

Field v. Evans, 15 Simons, 375, considered correct. — *Baker v. Bradley*, 597

PARTICULARS OF SALE. See **SPECIFIC PERFORMANCE**, 1.

PARTIES. See **BREACH OF TRUST**, 3.

PARTNERS. See **SOLICITOR**, 5.

PARTNERSHIP.

By a deed executed on a dissolution of partnership in 1825, reciting that it was thereby intended finally to settle all disputes and controversies between the partners, the retiring partner agreed to assign his interest in the partnership property to the continuing partner, subject to the payment of the former's share in the partnership debts, and the continuing partner agreed to enter into a covenant to pay the partnership debts, and indemnify the out-going partner against them. In 1831, a policy of assurance, part of the partnership assets, was assigned by the continuing partner to a mortgagee, * with notice of the deed of dissolution. The retiring partner died, and the continuing partner became bankrupt, whereupon partnership debts left unpaid by him were proved in a suit for the administration of the estate of the deceased partner.

* 762

1. *Held*, by Lord Justice TURNER, that, on the true construction of the whole deed, a lien was not intended to be created on the policy in respect of the unpaid partnership debts.

2. *Held*, by Lord Justice KNIGHT BRUCE, that, if it had been, still the mortgagee of the policy from the surviving partner was not bound to see to the application of the mortgage-money, and was justified in supposing that it would be properly applied. — *Re Langmead's Trusts*, 353.

PATENT. See **ARBITRATION**.

PERPETUITY.

By an indenture dated in 1529, conveying lands to a municipal corporation for charitable purposes, the corporation covenanted, that, when a term of ninety-nine years in a farm, part of the hereditaments granted, should expire, if any of the heirs of the body of a person named in the grant being of consanguinity and kindred of the grantor should come, claim and make lawful request to the mayor and burgesses for the time being to have a new grant and lease to him or her to be made within one year next after it should fortune the same farm to be void and come into the hands of the said mayor and burgesses, then and as often as any such chance should fall, the said mayor and burgesses for the time being, upon such request to them so made, should make or cause to be made a new lease and grant of the said farm to such heir so making request, for thirty-one years and no more nor less, reserving to them and their successors twenty marks of annual rent during the said term: *Held*, that the covenant was invalid, as creating a perpetuity. — *Hope v. Corporation of Gloucester*, 647.

PLEADING. See **BREACH OF TRUST**, 3. **PARENT AND CHILD.** **USURY.**

POLICY. See **INCUMBRANCE**, 2.

POWER.

A testator gave his property to his wife for life, and after her death to his two daughters, in such portions as the wife should appoint, but if she made no appointment, then to be equally divided between them, and

in case only one survived her mother the whole to the survivor, unless the deceased daughter should leave any children, in which case they should inherit the portion intended for their mother; and he expressed * his will to be, that the fortune of each of his daughters * 763 should go to her children after her decease, in such proportions as she might direct, but if no appointment, to be equally divided between them. The daughters were both married, and the widow appointed that, after her decease, one moiety should go to such uses as one of the daughters, and as to the other moiety, to such uses as the other daughter should appoint, and in default of appointment, to them absolutely. By a settlement dated the following day, each daughter appointed her moiety to her separate use for life, with remainder to her husband for life, with remainder to her children, with cross limitations: *Held*, that the appointment and settlements were effectual, subject to the question whether the limitations of life-interest to the husbands were valid. — *Jebb v. Tugnell*, 668.

POWER OF SALE.

A power of sale and of giving valid receipts for the purchase-money was, in a mortgage in fee, given to the mortgagee, his heirs, executors, administrators, or assigns: *Held*, that the administrator of a transferee of the mortgage, with the concurrence of a trustee to whom the heir of the mortgagee had conveyed the legal estate in trust for the administrator, could validly exercise the power, and enforce a specific performance of an agreement for a sale under it. — *Saloway v. Strawbridge*, 594.

PRACTICE.

1. An application to amend under the 7th of the general Orders of August, 1852, to amend a printed bill, partly by printed and partly by written, refused. — *Naylor v. Wright*, 408.
2. The three months mentioned in the 29th Order of August 7th, 1852, as to moving to dismiss for want of prosecution, are not to be reckoned exclusively of vacation. — *Bothamley v. Squire*, 246.
3. Where a defendant had been served with the bill out of the jurisdiction of the Court where he resided, but came from time to time to England, the Court declined to issue an attachment against him for want of appearance. — *Hackwood v. Lockerby*, 238.
4. On motion upon notice under the 3d Order of August 7, 1852 (second series), by a party against whom a decree had been made to enroll the decree after the expiration of six months from the time when the same was made, the burden of showing cause why it should not be enrolled, *held* to be on the party in whose favour the decree had been made. — *Kay v. Smith*, 383.
5. Leave granted on an *ex parte* application to present a petition of rehearing.

In a case of manifest error in a Master's report on which the decree affecting funds still in Court * was founded, a rehearing was * 764 granted after a lapse of thirty years. A purchaser of a *chose in action*

for value without notice is in the same position as his vendor who had notice. — *Brandon v. Brandon*, 365.

6. Under the 39th section of the Act 15 & 16 Vict. c. 86, an order for the production of a witness at the hearing of a cause may be obtained without the order of the Court. — *Holden v. Holden*, 397.

7. Two suits for the administration of the same estate having been instituted in different branches of the Court, and a decree having been made in the latter of the suits, the proper course for a party wishing to stay proceedings in the other is to get it transferred to the Judge who pronounced the decree, and to make an application in both suits before that Judge. — *Duffort v. Arrowsmith*, 434.

8. Although a cause has been reheard before a Vice-Chancellor, it may be heard by the Court of Appeal without special leave.

Decree made under the 40th Order of August, 1841, without prejudice to the rights of absent parties. — *Maybery v. Brooking*, 673.

See EVIDENCE. LANCASTER, DUCHY OF. OPENING BIDDINGS. RETROSPECTIVE ACT.

PREFERENCE SHARES. See PUBLIC COMPANY.

PRESUMPTION. See ESTATE PUR AUTRE VIE.

PRINCIPAL AND SURETY. See BREACH OF TRUST, 3. SOLICITOR, 4.

PRINTED BILL. See PRACTICE, 1.

PRIORITY. See ABATEMENT.

PRODUCTION. See LIEN, 3. SOLICITOR, 3.

PUBLICATION. See EVIDENCE.

PUBLIC COMPANY.

A railway company issued certificates of preference stock purporting to carry "interest" at 6l. per cent per annum in perpetuity.

Afterwards they obtained an Act of Parliament, which (after reciting that preference stock had been created, whereby priority was assigned in the payment of "dividends" to the extent of 6l. per cent per annum) enacted, that the railway company should pay "dividends" to the holders of such stock at the rate aforesaid, before they should pay any dividend to the holders of any other shares in the company.

By a subsequent Act the company was empowered to issue other shares called "debenture shares" bearing "interest" at 5l. per cent per annum, and was directed to apply the annual profits in payment: first, of interest on mortgages; * secondly, of interest on the debenture shares;

* 765 thirdly, of the "interest or dividend" on the guaranteed or preference shares and the arrears of such interest or dividends; and, fourthly, as therein mentioned.

A subsequent Act referred to the preference shares as bearing "a preferential interest or dividend."

Held, that the provision as to payment of "dividends" in the first-mentioned Act must be construed with reference to recital in it and to the subsequent Acts, and did not mean a share of current profits merely, but entitled the holders of the preference shares to resort to a subsequent division of profits to make their dividend up to 6l. per cent.

Semble, that the recital alone, having regard to the purport of the certificates, would have been sufficient to give this meaning to the word "dividend."

Whether it is competent to companies to create preferential shares under the general powers contained in ordinary Railway Acts, *quære*.

A preferential shareholder is entitled to file a bill to restrain the company from making a dividend prejudicial to his rights without waiting until there are funds to make a dividend. — *Sturge v. The Eastern Union Railway Company*, 158.

See BANKRUPTCY. INJUNCTION. WINDING-UP ACTS.

PURCHASE. See OPENING BIDDINGS. PRACTICE, 5.

RAILWAY COMPANY. See PUBLIC COMPANY. WINDING-UP ACTS.

RECOUPING. See WILL, 9.

RECOVERY. See ESTATE PUR AUTRE VIE.

REGISTER. See SHIP.

REHEARING. See PRACTICE, 5, 8.

REMOTENESS. See PERPETUITY.

RENEWAL. See PERPETUITY.

RETROSPECTIVE ACT.

Held, confirming the decision of Vice-Chancellor KINDERSLEY, *dissentiente* Lord Justice KNIGHT BRUCE, that the 15 & 16 Vict. c. 86, § 54, is retrospective in its operation, and that it empowered the Court to give special directions as to the mode of taking an account, including directions as to books of account being taken as *prima facie* evidence in a case in which the account, though not yet taken, had been directed by a decree pronounced * several years before the passing of the * 766 Act.

Held, also, that the statute ought not to be called in aid till all means of proving the account by independent evidence had been exhausted. — *Ewart v. Williams*, 67.

SALE. See POWER OF SALE. SPECIFIC PERFORMANCE, 1, 2.

SALE, UNDER DECREE. See OPENING BIDDINGS.

SATISFACTION. See SETTLEMENT.

SCOTCH LAW. See DOMICILE.

SEPARATE USE. See HUSBAND AND WIFE.

SERVICE. See PRACTICE, 3.

SETTLEMENT.

By a marriage settlement in 1802, two several sums of 1000*l.* were to be paid by A., the father of the intended wife, to trustees, for the husband and wife and their children. One of these sums was payable immediately, and the other on the death of A. In 1806 and 1810 respectively, A. advanced two sums of 1000*l.* each to the husband, who signed a receipt for the same on the back of the settlement. In 1817,

shortly before the death of A., he settled 5000*l.* on his daughter and her husband and issue, on trusts almost identical with those of the settlement of 1802, and contemporaneously he made his will, wherein he stated, "Whereas I have advanced to my two sons and to my daughter Jane and her husband, in money, stock, and by other means, in value of a considerable amount, now to prevent any question whether such advancements were meant and intended as loans or gifts, I hereby declare they were gifts, and not loans; and it is my will and intention, that as well what I have already given as what I give by this my will to my said sons and to my daughters Jane and Elizabeth they shall receive and take in full satisfaction and discharge of all claims and demands upon me in any right or manner whatsoever." Eleven years after the death of the daughter Jane and her husband, the plaintiff, who had married one of their children, filed his bill against the representative of the surviving trustee of the settlement of 1802, claiming his wife's share in the two several sums of 1000*l.* under that settlement: *Held*, dismissing the bill with costs, that, though the trustees might have had no direct defence against the claim, yet that, having regard to the provision in A.'s will, and inasmuch as his estate would be ultimately liable, * such claim was circuitously barred. — *Davis v. Chambers*, 386.

* 767 See DOMICILE. INFANT. MARRIED WOMAN, 1. PARENT AND CHILD. SHARES. See PUBLIC COMPANY. SHIP.

Registered first mortgagees of a ship with power of sale took from the mortgagor, by an unregistered document, a declaration that the mortgage should be a security, not only for the mortgage debt, but for such sums as might for the time being be due from the mortgagor either alone or with any partner to the mortgagees or their firm, however composed. Subsequently another incumbrancer took a registered mortgage expressed to be subject to the first mortgage, but not referring to the unregistered charge, of which, however, the last mortgagee did not deny having had notice, when he took his security: *Held*, that the unregistered document was not merely a further charge, but a new security, and that the shipping Acts excluded it from priority over the last mortgage. — *Parr v. Applebee*, 585.

SOLICITOR.

1. A solicitor, who, without authority, instructed counsel to appear for parties interested in money in Court, and to consent to its payment out of Court, was ordered to be struck off the rolls. — *Re Collins*, 558.
2. A mortgagor instructed his solicitors, to whom he was indebted in a bill of costs, to prepare a reconveyance of the mortgaged property. They did so, and sent the engrossment to the mortgagees' solicitors, with an intimation that they had a lien on it, and a request that the mortgagees' solicitors would hold it on account of the mortgagor's solicitors. The engrossment was executed by the mortgagees. The mortgage-money was not paid, but the mortgagor sold the property to pur-

chasers who agreed to pay it: *Held*, that the mortgagees' solicitors had a lien on the engrossment, and that such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solicitors not covering their whole demand, and that the purchaser had been properly restrained by injunction from proceeding at law to recover the deed. — *Watson v. Lyon*, 288.

3. A deed containing a recital alleged to be material to the case of defendants in a suit was in the custody of the solicitor of some of the parties to the deed, and he claimed a lien on it in respect of the costs of its preparation. On his being called as a witness by the defendants, who were not his * clients or parties to the deed, to produce it: * 768 *Held*, that he could not refuse to do so by reason of his lien. — *Hope v. Liddell*, 331.

4. A brother and sister entitled in moieties to a reversionary interest in a fund in Court, mortgaged it to secure a debt of the brother, the sister joining, and being described in the security as a surety for the brother. The mortgagee obtained a stop order, and afterwards on his marriage assigned the mortgage-debt to trustees, who, however, neither obtained a stop order nor gave notice to the sister of the settlement. On a petition of the brother stating that the tenant for life had assigned to him her life-interest in his share of the fund, and that he had paid a portion of the mortgage-debt, and praying for a transfer of his share of the fund, a solicitor who had acted for the sister and for the mortgagee on the occasion of the mortgage, took upon himself without authority to instruct counsel to appear for the sister and her husband, and also for the mortgagee, who was abroad, and to consent to or not oppose the petition. Upon the hearing of this petition the fund was ordered to be, and was transferred out of Court: *Held*: —

That the mortgagee was not bound or affected by the authorized appearance for him.

That neither the omission of the trustees to obtain a stop order, nor any of the above circumstances, operated to discharge the liability of the surety's share, but that it continued subject to the payment of the mortgage-debt.

On the above circumstances appearing in evidence, although the solicitor was not a party, but only a witness in the cause, the Court directed him to be served with notice to show cause why he should not be struck off the roll. — *Wheatley v. Bastow*, 261.

5. Where two separate solicitors are retained by the same clients in the same business, the presumption of law is, that as their liability is joint, the profits are to be equally divided, and this presumption is not removed by the delivery of separate bills of costs where the solicitors have conducted different parts of the business. Where, therefore, the evidence in favour of an agreement for a different division was not stronger than that against it, the Court decided in favour of equality.

In a case of conflicting testimony, neither party has the right to demand

an issue, if the Court is able without one to arrive at a conclusion satisfactory to its own mind. — *Robinson v. Anderson*, 239.

See LIEN, 2, 3.

SPECIAL OCCUPANT. See ESTATE PUR AUTRE VIE.

SPECIFIC PERFORMANCE.

1. In the particulars of sale of certain leaseholds, the premises were
* 769 * stated to be sold "by order of the executors," they were in fact sold by the administrator *de bonis non* of the testator *durante absentia* of his next of kin. The sale was by auction, and the purchaser paid the usual deposit, but refused to complete on discovering the nature of the vendor's title: *Held*, dismissing a bill for specific performance, that although the effect of the grant during the lifetime of the absent principal would have been perfectly valid, yet, inasmuch as the principal might at the time of the sale have been dead, the title was not such as a purchaser was bound to accept, and the deposit, with interest, was ordered to be refunded. — *Webb v. Kirby*, 376.
2. One of two executors, erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate: *Held*, that the purchaser could not enforce a specific performance of the contract. Whether he could have done so if the executor had been under no misapprehension, *quære*. — *Sneecby v. Thorne*, 399.
3. An agreement to take a lease of a house if put into thorough repair, and the drawing-rooms "handsomely decorated according to the present style," *held*, too uncertain for the Court to enforce. — *Taylor v. Portington*, 328.

See ARBITRATION. POWER OF SALE.

STATUTE OF LIMITATIONS.

One of two persons who had dealings together and were mutually indebted to one another, had supplied some bricks on the credit of the other in 1834, but no account had been delivered or made out on either side. In 1845 they signed in duplicate a memorandum thus expressed: "It is agreed that Mr. R., in his general account, shall give credit to Dr. H. for 174l., being for bricks delivered in 1834:" *Held*, that this was insufficient to exclude the mutual debts from the operation of the Statute of Limitations. — *Hughes v. Paramore*, 229.

See ESTATE PUR AUTRE VIE.

STOP ORDER. See SOLICITOR, 4.

SUBSTITUTION. See WILL, 4, 11.

SURETY. See BREACH OF TRUST, 3. SOLICITOR, 4.

SURVIVOR. See WILL, 1, 2.

TENANT FOR LIFE. See INCUMBRANCE.

TENURE. See ENCLOSURE ACT.

TITLE-DEEDS. See LIEN, 2.

* 770 * TRADING. See BANKRUPT.

TRANSFEE. See POWER OF SALE.
TRUST.

An executrix, who was also tenant for life under a will directing the residuary estate to be sold and the proceeds invested in government or other good security, held not personally liable for not converting into consols a sum of navy 5l. per cents, forming part of the residuary estate. — *Baud v. Fardell*, 628.

See BREACH OF TRUST. BUILDING SOCIETY. CHARITY. DECREE. DEED.
LIEN, 1. WILL, 9.

TRUSTEE. See FRIENDLY SOCIETY.

UNDUE INFLUENCE. See PARENT AND CHILD.
USURY.

A reversioner in fee, expectant on the death of a tenant for life aged sixty-one, mortgaged in 1819, his reversion by way of trust to secure repayment of an advance of 500l. on the death of the tenant for life, with 500l. more if the tenant for life died within five years, and twice as much more if he died after that period: *Held*, under the law then in force, that the security was void as usurious.

To a foreclosure bill filed by a mortgagee stating subsequent incumbrances, and that some specified defendants claimed an interest in the mortgaged property, one of these defendants put in an answer claiming to be entitled under the above-mentioned security. By the decree the usual reference was directed as to incumbrances and their priorities. The above defendant claimed as an incumbrancer under this decree, and the Master disallowed his claim: *Held*, that the Master had jurisdiction so to decide, although the security was not impeached by the pleadings. — *Earl of Mansfield v. Ogle*, 181.

VACATION. See OPENING BIDDINGS. PRACTICE, 2.

VENDOR AND PURCHASER. See OPENING BIDDINGS. POWER OF SALE. PRACTICE, 5. SPECIFIC PERFORMANCE, 1, 2.

VESTED INTEREST. See WILL, 4.

WARD OF COURT. See INFANT. MARRIED WOMAN, 1.

*WEST INDIA ESTATES. See LIEN, 1.

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WIFE. See ACKNOWLEDGMENT. DOWER ACT. INFANT. MARRIED WOMAN. HUSBAND AND WIFE. WILL, 3.

WILFUL DEFAULT. See INCUMBRANCE, 1.

WILL.

1. A testator bequeathed life-interests in four distinct funds to four nieces respectively, and directed that, upon the decease of any or either of them, the principal of the fund to the interest of which such niece was entitled should be held in trust for the benefit of all and every the

lawful children of her or them so dying, and of the survivors or survivor of the testator's other nieces thereinbefore named in equal shares. One of the nieces died leaving two children, and then another niece died without having had a child: *Held*, upon the construction of the whole will, that the children of the former niece were entitled to participate in the fund of which the latter had been tenant for life. — *Peacock v. Stockford*, 129.

2. A testator bequeathed as follows: —

"I give to my daughter S. 50*l.* per annum for life. I give to each of my other daughters 5000*l.*, the interest of which for their use independent of any husband they may have, and if they should have any children the principal to be divided among them after her death if they should attain the age of twenty-one years; if not it is to be divided between her surviving sisters, share and share alike." The testator died, leaving S. and four other daughters, A., B., C., D., surviving. Of these, A. afterwards died, leaving two children, both of whom died under twenty-one, and B. survived A., but died before the survivor of her children: *Held*, that the 5000*l.* bequeathed to A. became, upon the death of the survivor of her children, divisible amongst her sisters, including S., then surviving, in exclusion of the representatives of B. — *Carver v. Burgess*, 95.

3. A testator devised lands to a married woman for life, with remainder to her son C. D. and his assigns for life ("he or they" not committing waste), with remainder to trustees to preserve contingent remainders, with remainders to the first and other sons of C. D. successively, with remainders over, and a proviso that the person or persons entitled in possession should with "his or their" family or families while "he or they" should continue so entitled, reside at the mansion-house, and make it "his or their" principal place of abode, or in default thereof, that the devise to "him and them" should cease, but not so as to prevent the * remainders limited to "his or their" son or sons from taking effect, the testator declaring that the limitations to trustees to preserve contingent remainders should take effect after any cesser for non-compliance with the condition. The testator gave the residue of his personal estate to trustees, to be invested in the purchase of lands to be settled to the uses of the devised lands.

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Held, that the proviso as to residence applied to the married woman, and was sufficiently distinct to create a forfeiture on her refusing to reside after she became a widow.

Held, also, that the Court could not direct a portion of the residuary personal estate to be applied in improving the mansion-house. — *Dunne v. Dunne*, 207.

4. A testator, having three sons and three daughters, gave by his will his residuary estate in trust to be divided into six shares ("being as many shares as" he had children), one share to be for the benefit of each child in manner following, viz., the share of sons to be paid to them as soon as convenient after the testator's death, and the shares of daugh-

ters to be vested in trustees for their respective benefit as thereafter mentioned. Provided that if any son died without having issue living at his death, the share intended for such son, and any share accruing under that proviso, should accrue to the survivors of the testator's children, their executors or administrators. And he directed his daughters' shares to be invested upon trusts therein mentioned for them and their children. By a codicil, reciting that he desired to settle more distinctly the share of one of the daughters, he revoked the will as to her share, and gave it in trust for her for life, and after her death for such of her children as should attain twenty-one, or, being daughters, marry; and in case she should have no child living at her decease who should attain a vested interest, in trust for the testator's children who should be living at her decease, and the representatives of such as should be dead. One of the testator's sons died in his lifetime bachelor, and the above-mentioned daughter died after the testator's death a spinster: *Held*, —

That the surviving sons' shares, both original and accruing, vested absolutely on the testator's death, the clause of substitution, as to sons' shares, operating only in case of death in the lifetime of the testator.

That the daughters' accruing shares vested in them absolutely. — *Ware v. Watson*, 248.

5. A testator had a daughter who, at the date of his will, was a widow, having been twice married. By his will, dated after the Wills Act came into operation, he gave a sum of stock upon trust to pay the income to her for her life or until her marriage, and after her *decease * 773 or her marriage, which should first happen, upon trust for her children by both her late husbands. After the date of the will the daughter married a third time, with the knowledge and approbation of the testator, who, however, died without republishing his will: *Held*, that the daughter took no interest under it.

The provision in the Wills Act, that the will is to be construed as if made immediately before the testator's death relates only to the property comprised in the will. — *Bullock v. Bennett*, 283.

6. A testator, possessed of various leasehold estates, some of which were mortgaged and others not, specifically bequeathed the latter to the plaintiff, and the former to other parties; and after making other specific and pecuniary bequests, gave the residue of his personal estate to his wife, and directed his trustees and executors to receive the rents of all his property, and to apply the same in payment of his debts, together with the principal money and interest owing upon the mortgage of his property, and of the legacies and annuities given by his will, until the whole should be fully paid: *Held*, that the bequest of the incumbered leaseholds was not a bequest of the equity of redemption only; that the relative values of all the leaseholds should be ascertained; and that the plaintiff was not entitled to be let into possession before she had contributed her ratable proportion in discharge of all the debts and legacies. — *Harper v. Munday*, 369.

7. A. and B. having been bankrupts in 1822, B., the survivor, in 1851, by his will directed his executors and trustees to pay his just debts, including the unpaid in full debts proved under the bankruptcy, and he directed his executors to pay to the official manager of the bankruptcy, or to some authorized person to be appointed by the Court of Chancery, in trust for all the creditors under the commission, so much money as would make the dividend on the estate equal to 20s. in the pound on all the debts so proved: *Held*, that the direction to pay must be regarded as a bounty, not only in favour of those creditors who survived B., but of representatives of those who predeceased him, and that the official assignee of the joint estate was entitled to receive the amount found due to all the creditors, less the amount of legacy duty. — *Turner v. Martin*, 429.

8. A testator bequeathed a debt which he described as due to him from the legatee's late husband. At the date of the will and at the time of the testator's death the estate of the legatee's husband was indebted to a firm in which the testator was a partner, and a portion of this debt consisted of a sum for which, although originally a debt due to the firm, the husband had given a promissory note to the * testator alone; against this note the Statute of Limitations had run, and it was barred by the certificate of the husband, who had become bankrupt. It had, however, been included in a subsequent account between him and the firm as a debt to the firm, and was acknowledged by him to be due: *Held*, that there was not any thing strictly answering the description contained in the bequest, and that it must be taken to apply to the whole debt due to the firm. — *Maybery v. Brooking*, 673.

9. Personalty was bequeathed upon trust for tenants for life, with executory trusts in remainder, but without directions as to investment. The trustees at the instance of the tenants for life abandoned their original intention of investing in the funds, and invested on mortgage so as to obtain an increased income, but it did not appear that the tenants for life approved of the particular securities which were taken and which proved insufficient. On the trustees being decreed to make good the loss: *Held*, that the tenants for life and their interests in the trust funds were liable to recoup to the trustees the amount ordered to be paid by them to the extent of the income received by the tenants for life respectively from the mortgages.

Semble, that in the absence of directions as to investment trustees cannot properly invest on mortgage. — *Raby v. Ridehalgh*, 104.

10. Bequest of "all my moneys," *held* to include two balances standing to the credit of the testator at his bankers, — one upon an ordinary current account, the other secured by deposit notes bearing interest.

Secus, as to a sum of money returned to the testator's personal representative by stakeholders with whom the testator had placed it to abide the result of a wager which remained undecided at his death.

Moneys which had been deposited with the testator to abide the result of

bets between himself and the depositors were, after his death, returned to the depositors by his administratrix, who, at the same time, paid the amount of such of the bets as were not still pending at the testator's death, but had been decided against him in his lifetime: *Held*, that in respect of the deposits so returned upon bets not decided in the testator's lifetime, the administratrix was entitled to credit in her accounts against the general estate; but not so in respect of the sums paid for bets decided before the testator's death and for the deposits upon such bets.

The testator died in the occupation of a furnished tavern where he carried on the business of hotel-keeper and betting agent, sleeping there occasionally for the convenience of his business, but having his ordinary residence at another house: *Held*, that such parts only of the tavern furniture as were for the testator's own domestic or * per- * 775 sonal use passed under a bequest of "all my household furniture" contained in his will.

In construing a will of personal estate, the Court, notwithstanding an objection by counsel that the probate copy alone could be looked at, ordered the original will to be produced, and had regard to certain erasures appearing therein, but which had been omitted in the probate. — *Manning v. Purcell*, 56.

11. A testatrix gave "to each of the present nieces of A. B., for her own absolute benefit, the sum of 2000*l.*, and in case any of them shall die in my lifetime, leaving a child or children who shall survive me, then and in every or any such case the legacy intended for her so dying shall go to her child or children in equal shares if more than one." At the date of the will and death of the testatrix there was only one niece of A. B. alive, but there were several grandnieces and great-grandnieces: *Held*, that the bequest was confined in its terms to the niece of the first degree, and that the children of nieces who were dead at the date of the will were not entitled to take by substitution. — *Crook v. Whitley*, 490.

See ABATEMENT. ANNUITY. ASSETS, 1. CHARITY. DEED. HUSBAND AND WIFE. LIEN, 1. POWER. SETTLEMENT. TRUST.

WILLS ACT. See WILL, 5.

WINDING-UP ACTS.

By the subscription contract of a provisionally registered railway company, giving the usual powers to the committee of management, the subscribers covenanted that in the event of the application to Parliament being unsuccessful, they would pay and discharge all the costs and expenses which should have been incurred with a view to the formation of the undertaking, and all other costs and charges of every description of and incidental to the undertaking, such costs and charges to be assessed ratably on the sums subscribed by them respectively. On winding up the company under the Winding-up Acts, it appeared that the directors had received from the subscribers more than sufficient to pay all the necessary costs, expenses, and charges, but had applied the

moneys to purposes which were alleged by the subscribers to be unauthorized and improper, and a compromise was come to with the directors in pursuance of which the directors paid a sum in full of all demands of the contributories upon them. Claims had been admitted to proof as debts against the company under the winding-up * order: *Held*, that a general call had been properly made for the purpose of paying the demands thus proved, whether the creditors could have sued the general subscribers directly or not, as to which, *quære*. — *Hopkinson's and Underwood's Case*, 193.

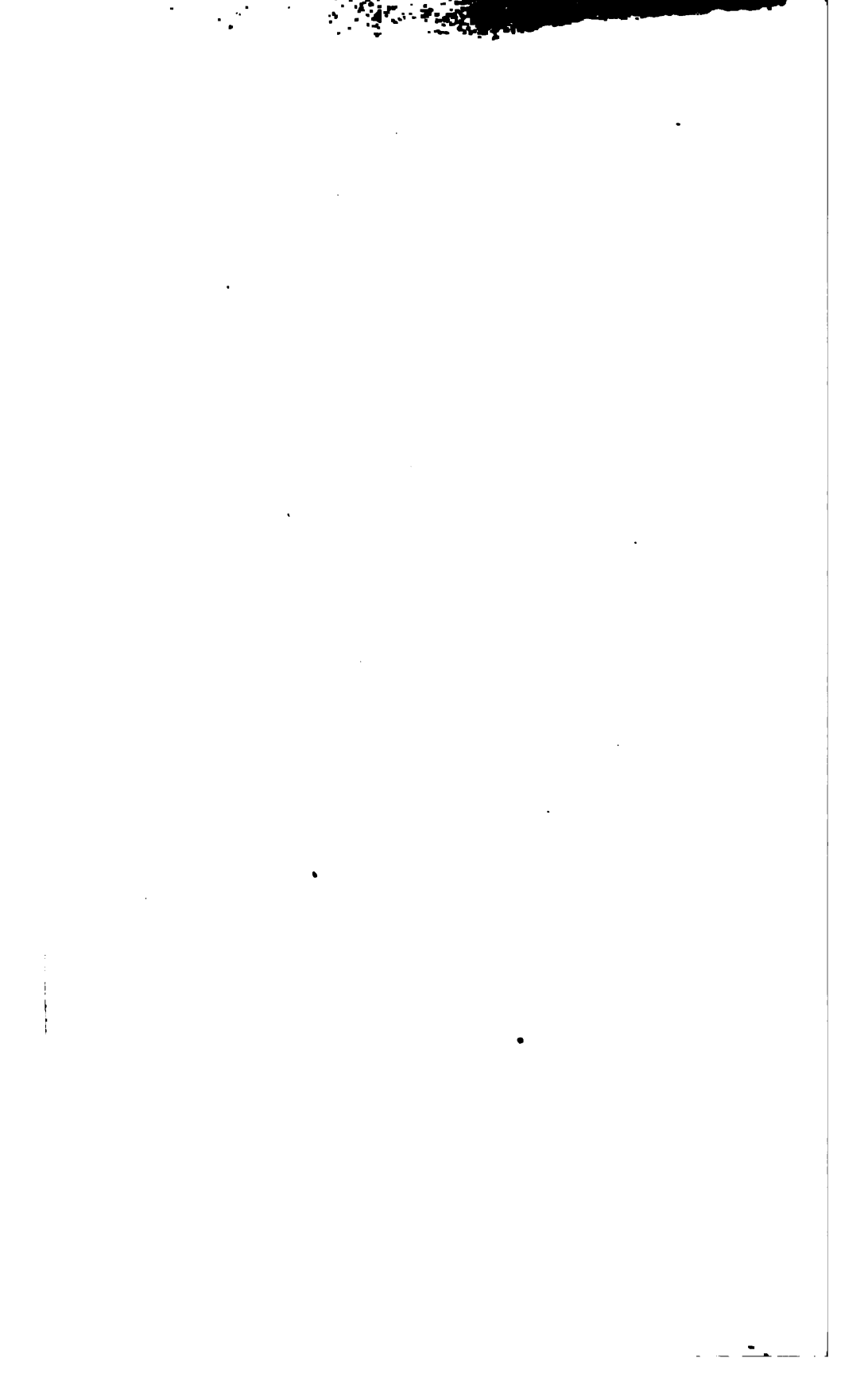
2. By the subscribers' agreement of a provisionally registered railway company, prepared by the direction of some of the persons who were named in it to be managing directors, the persons made parties to the deed of the first part (the subscribers) covenanted to indemnify the persons therein named as managing directors (who were expressed to be parties of the third part, as distinct parties, and also to be among the parties of the first part) from all payments, losses, and expenses incurred or to be incurred by them in the formation or management of the concern. No one of the persons nominated as managing directors executed the deed or paid any money. One of them died before any subscriber executed the deed, and two others never consented to act. On the company being wound up, *held*, that there had been material misrepresentations of facts on the part of those who caused the deed to be prepared and submitted to the subscribers for execution, and that such persons nominated as managing directors as could be shown to have acted, were primarily liable to calls for the payment, whether of the debts of the company or of the costs of winding up, and that until their liability was exhausted, the subscribers who had signed the deed as parties of the first part, could not be called upon to contribute.

Held, also, that the subscribers were entitled to insist on this defence without taking a substantive proceeding to set aside the deed, but —

Held, *per* Lord Justice TURNER, that, inasmuch as the covenant contained in the deed to indemnify the managing directors, was entered into by the subscribers on the faith of its being entered into by the managing directors also, there arose, upon the failure of the directors to execute it, an equity in favour of the subscribers to have the deed delivered up to be cancelled, or, at all events, to insist that it should not be enforced against them. — *Carew's Case*, 42.

WITNESS. See PRACTICE, 6.

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